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No.

In The
Supreme Court of the United States

October Term, 1992

CENTRAL BAPTIST THEOLOGICAL SEMINARY,
Petitioner,
vs.
STATE OF MINNESOTA, DEPARTMENT OF NATURAL RESOURCES AND JOSEPH N. ALEXANDER, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state, consistent with the Just Compensation Clause of the Fifth Amendment, rely on an administrative agency's permit denial, rendered in an administrative proceeding in which no taking issues were or could be considered, to estop collaterally a landowner's inverse condemnation claim?

2. When changes in state law subject property to certain land-use restrictions for the first time years after the owner acquired the land, is it consistent with *Lucas v. South Carolina Coastal Council*, ___ U. S. ___, 120 L.Ed.2d 798 (1992), for a state appellate court reviewing an inverse condemnation claim to base its decision on the newly-applied statutory restrictions rather than on the owner's rights under the previously-existing common law?

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were plaintiff Central Baptist Theological Seminary, a nonprofit organization incorporated in Minnesota, and defendants State of Minnesota, Department of Natural Resources and Joseph N. Alexander, the Department's former Commissioner. Central Baptist Theological Seminary has no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner Central Baptist Theological Seminary ("Central Seminary" or "the Seminary") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the court of appeals of the State of Minnesota dated June 17, 1992.

OPINIONS BELOW

The state district court issued its findings of fact, conclusions of law and order of judgment, dated May 8, 1991, ruling that the State of Minnesota, Department of Natural Resources ("DNR") had taken Central Seminary's property in violation of the United States and Minnesota constitutions. (App. B.) The district court entered an order, dated May 28, 1991, modifying its findings of fact, conclusions of law and order of judgment to make certain procedural clarifications requested by the district court administrator's office, and judgment thereafter was entered in favor of Central Seminary. (App. C.) The district court issued a subsequent order, dated August 19, 1991, awarding the Seminary attorneys' fees, interest, costs and expenses. (App. D.) The May 8, May 28, and August 19, 1991 orders were not reported. The Minnesota court of appeals reversed the district court's decisions, and its judgment and opinion, dated June 17, 1992, is reported at 487 N.W. 2d. 528 (Minn. App. 1992) (App. A.) The Minnesota supreme court denied Central Seminary's petition for review in an unreported order filed August 27, 1992. (App. E.)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review, by writ of certiorari, the judgment and opinion of the Minnesota court of appeals, dated June 17, 1992. By

order dated August 27, 1992, the Minnesota supreme court denied discretionary review of the court of appeals' decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amends. V and XIV. The provisions of Minn. Stat. §§ 105.42 and .45 (1984) and Minn. Rule 6115.0210 (1984), which formed the basis of the state regulatory action challenged here, are set forth in Appendix F.

STATEMENT OF THE CASE

The Minnesota court of appeals' decision allows a state regulatory agency to wield a sharp two-edged sword against a landowner; the same administrative finding that cut away all value from the property has been held to cut away all rights to compensation the landowner might have under the Fifth Amendment. Three things stand out from this protracted dispute: a state agency's permit denial precluded all economic use of a landowner's property; this regulatory action was based on state statutory land-use restrictions first applied to the property at least ten years after it was acquired; and the appellate court's decision deprived the landowner, Central Seminary, of its federal right to assert an inverse condemnation claim arising from the permit denial.

Although the state district court found in favor of the Seminary, the Minnesota court of appeals reversed, holding that DNR's permit denial impliedly disposed of the Seminary's federal and state taking claims. The

appellate court so held even though both the administrative agency denying the permit and the court reviewing the denial expressly declined to consider the taking issues in the permit proceeding. Although the Seminary raised its taking claims at each step of the administrative process, the adjudicating entities declined to consider them because DNR successfully argued that under state law there was no jurisdiction to resolve the constitutional issues in the permit proceeding, and that in any event, the claims were then premature and could be asserted only in a district court action that would not be ripe until after final permit denial. The result of the court of appeals' ruling is that Central Seminary will never have an opportunity to have its Fifth Amendment claim considered on the merits in any forum.

This case also is significant because the Minnesota court of appeals' decision conflicts with *Lucas v. South Carolina Coastal Council*, ____ U.S. ___, 120 L.Ed.2d 798 (1992), by permitting a state to kill, as it were, two birds with one stone: to deny a permit under newly-applied statutory provisions and to dispose, by implied estoppel, of the resulting taking claim simultaneously by the same administrative action. The court of appeals' refusal to provide a forum where a landowner's taking evidence, not the public interest justification for state regulation, can be considered conflicts with the "total takings" inquiry required by this Court. More specifically, the Minnesota court, in contravention of *Lucas*, explicitly declined to determine whether background principles of state property and nuisance law applicable at the time the property was acquired permitted the proposed project. The Minnesota court instead improperly limited its taking inquiry to the question of whether the challenged permit denial was a valid exercise of police power under the terms of the statutory requirements that became applicable to Central Seminary's land years after it was acquired.

A. The Facts Material To This Court's Consideration Of The Questions Presented

Petitioner Central Seminary is an educational institution, organized since 1956 as a nonprofit corporation under Minnesota law. The Seminary operates radio station WCTS–FM, which broadcasts music, news, religious and biblical programming, community affairs, and family, educational, home and financial information.

This case arises from DNR's refusal to permit Central Seminary to rebuild the WCTS radio tower after it was destroyed in a windstorm on August 7, 1980. The tower was built with the approval of all necessary regulatory authorities in 1964–1965 on land in New Brighton, Minnesota, a Minneapolis–St. Paul suburb, acquired by Central Seminary in 1962 and 1963 for the sole purpose of constructing a tower for its radio station. This property, in what then was a remote area with few neighbors, provided an ideal tower site. Although development in the vicinity of the tower gradually increased, broadcast operations continued without objection.

Most of the site was covered periodically with shallow water, principally from the storm water and snowmelt collection systems of local governmental bodies. Although at times this marshy area was completely dry, it was known locally as "Jones Lake." At the time of Central Seminary's purchase of the underlying land and for many years thereafter, this surface water was unregulated by any governmental authority. In fact, the Seminary anchored part of its tower directly in "Jones Lake" with the knowledge of both the city (then village) of New Brighton, which granted the necessary land-use approvals, and DNR, which did not require a permit.

After a windstorm destroyed the tower, Central Seminary immediately embarked on an effort to rebuild

it. Although the city would not allow the tower to be rebuilt in exactly the same place, due to the presence of nearby buildings constructed in the intervening years, it did approve of the Seminary's plan for a replacement tower near the center of its property, within several hundred feet of the original location. All other governmental entities also granted their approvals–except DNR.1/

In 1982, two decades after Central Seminary acquired its land, and while the Seminary was planning its replacement tower, DNR had designated approximately 24 of the Seminary's 25 acres as a protected wetland under Minn. Stat. ch. 105.2/ As a result, the Seminary needed DNR approval to rebuild its tower. When, in the course of reviewing the permit application, DNR raised environmental impact questions, the Seminary devised

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1/ The other approvals obtained by the Seminary were from the Federal Communications Commission, Federal Aviation Administration, United States Army Corps of Engineers and Rice Creek Watershed District.

2/ Under a state law enacted in 1979, DNR was required to participate in a wetlands evaluation process in which county hearing units were responsible for formally classifying–or in the statute's terminology "designating"–wetlands according to the standards established in United States Fish and Wildlife Service Circular 39 (1971 edition). Minn. Stat. § 105.391 (1979). Certain wetlands "designated" as types 3, 4 or 5 under the Circular 39 standards became "public waters" subject to DNR jurisdiction and agency regulations which had been promulgated in 1978. *Id.* § 105.37, subds. 14 and 15 (1979); *see, e.g.*, 6 M.C.A.R. §§ 1.5020-.5028 (1978). DNR "designated" Jones Lake as a type 4 wetland in 1982, and arguably this date represents the first time DNR gained jurisdiction over Central Seminary's land. Other changes in Minn. Stat. ch. 105 may have made the Seminary's property subject to DNR authority earlier, but as the district court found, the earliest date at which DNR could have gained such jurisdiction was 1973, over ten years after the Seminary acquired its land. (App. B at A-24-29, 44-45.) DNR did not challenge on appeal any of the district court's findings regarding this jurisdictional question, and the court of appeals left the lower court's jurisdictional ruling intact.

mitigative techniques to address the concerns, which were focused on potential harm to waterfowl. The agency staff nonetheless rejected the permit application in January 1983.

As required by Minnesota law, a contested case hearing ensued, but the presiding administrative law judge ("ALJ") issued a report recommending that the permit be denied as inconsistent with the wetland protection requirements of Minn. Stat. ch. 105 (1984) and DNR rules promulgated thereunder. Under the Minnesota Administrative Procedure Act, Minn. Stat. ch. 14 (1984), final disposition of the permit application rested with the DNR Commissioner, and his order adopted the ALJ's recommendation and denied Central Seminary's application. On appeal, the Minnesota court of appeals upheld the permit denial under Minn. Stat. ch. 105 (1984) and rules then in effect on the ground that the planned tower may impact wildlife habitat by causing avian mortality among the several hundred ducks and other birds at the site.[3/]

The loss of the tower was devastating for Central Seminary, as the unchallenged facts from the district court's findings demonstrate. *See* App. B at A-37-44, 46-49. The Seminary was left with no economic use of its land, over 95 percent of which is covered by what now has become DNR-regulated wetland, for which the Seminary has no access other than an easement for the prohibited radio tower use, and on which there are no (and, because of DNR's rules and the land's physical characteristics, in the future there can be no) utilities, roadways or structures. As DNR stipulated, land worth $725,000 as a radio tower site now was rendered without economic

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3/ *See In re Application of Central Baptist Theological Seminary*, 370 N.W.2d 642 (Minn. App. 1985), *pet. for review denied*, (Minn. 1985) ("*Central Baptist* I") (relying on Minn. Stat. §§ 105.42 and 45 (1984) and Minn. Rule 6115.0210 (1984) to affirm the DNR permit denial).

value. Moreover, as DNR also stipulated, the Seminary was left to incur nearly $1 million over the next 20 years for new antenna space to replace the facilities it had without charge at the New Brighton site.4/

Because of these inevitable impacts, Central Seminary urged that a permit denial would violate the federal and state constitutional protections against uncompensated takings at each stage of the administrative process, from a pre-hearing motion to the administrative law judge through the appeal to the state appellate court reviewing DNR's regulatory action. *See* note 8 *infra*. DNR in response each time successfully argued that there was no jurisdiction under state law to consider these constitutional issues in the permit proceeding,5/ and that in any event, the Seminary was asserting its taking claims prematurely because they would not be ripe until final permit denial occurred, at which time the Seminary's remedy would be to pursue an inverse condemnation action in district court. *Id.*; *see also Central Baptist I*, 370 N.W.2d at 649 ("[The taking issue, raised on appeal and below] has not been considered in any forum and there is no record for us to review on appeal. We decline to address the issue.").

4/ Radio tower space for years has been at a tremendous premium in the Minneapolis-St. Paul area because demand has grown steadily but supply is extremely scare. The Seminary was forced to incur moving expenses of nearly $100,000 and to rent space on a new tower under a 20-year contract at an annual cost of $42,900 plus lump sum payments totalling $435,000 in 1986 and 1987. *See* App. B at A-43-44. Because this new tower is located far north of the Seminary's property, the broadcast coverage from the leased tower is inferior to that provided at the New Brighton site.

5/ Under Minn. Stat. ch. 14 (1984), which governed the permit proceeding, neither the administrative law judge who presided over the contested case hearing nor the DNR Commissioner who had ultimate responsibility for acting upon the permit application had jurisdiction over the taking issue. *See* note 8 *infra*.

B. The Procedural History Relevant To This Court's Consideration Of The Questions Presented

1. *State District Court: DNR Violated The Federal And State Constitutions*

After the permit denial became final, Central Seminary, consistent with the procedures established under Minnesota law, commenced an action by complaint in state district court. It sought a writ of mandamus ordering DNR to initiate condemnation proceedings due to its violation of the guarantees against uncompensated takings provided in the Fifth and Fourteenth Amendments of the United States constitution and Article I, Sections 7 and 13 of the Minnesota constitution. (App. B at A–49.) After the parties stipulated that the jury would find certain facts, including the facts regarding the economic impacts of the permit denial, a bench trial was held on March 19–22, 1991.

The district court found in favor of Central Seminary in all respects. It ruled that DNR had violated both the federal and state constitutional proscriptions against uncompensated takings. (App. B at A–46-50.) The court's key rulings included determinations that Central Seminary had a lawful right to build the proposed replacement tower on its land when it was first acquired in 1962; the Seminary acted lawfully in building its original tower in 1964–1965 and operating it thereafter; the property was not subject to DNR jurisdiction until 1973 at the earliest; the project would not have created a nuisance or other health or safety concerns, nor would it have injured others or interfered with any neighboring properties; the Seminary had reasonably expected to use its land as a radio tower site from the time of its acquisition in the early 1960s and at all times thereafter; DNR's permit denial deprived the Seminary of any

reasonably beneficial or economic use of its property; the Seminary received no benefit from the permit denial; and the Seminary has been uniquely burdened by DNR's action, which was designed to further the state's legislative policies and to secure benefits for the public at large without any payment or compensation.[6/] The district court meticulously detailed its decision in three orders which directed DNR to initiate condemnation proceedings to determine the value of the land taken, and to pay certain damages, attorneys' fees, costs, expenses and interest. (Apps. B–D.)

2. *The Minnesota Court Of Appeals: The Seminary's Federal and State Constitutional Claims Were Estopped*

On appeal, the Minnesota court of appeals reversed. The appellate court did not overturn any of the district court's factual findings, nor did it conclude that the lower court had relied on incorrect constitutional principles. Instead, the court of appeals disregarded completely the district court's findings and created an implied collateral estoppel theory never advanced by DNR at any time during the many years of these proceedings. *Central Baptist Theological Seminary v. State of Minnesota Department of Natural Resources*, 487 N.W.2d 528 (Minn. App. 1992) ("*Central Baptist II*"). (App. A.)[7/]

[6/] *See* Findings 29–33, 39–41, 47–56, 111–118; Conclusions 1–8, 15. (App. B at A–18-19, 21-24, 34-35, 44-48.)

[7/] DNR previously has urged that the permit proceeding explicitly considered and resolved the taking and common law issues raised by Central Seminary in this inverse condemnation action. That position is factually incorrect. *See Central Baptist I*, 370 N.W.2d at 646–48 (court of appeals limits its ruling to upholding DNR's permit denial as valid on statutory grounds, and declines to determine when DNR gained jurisdiction over the Seminary's land, what common law rights the Seminary held, or whether a taking had occurred). DNR's position was

The court of appeals ruled that DNR's order in 1985 denying the permit application collaterally estopped Central Seminary's inverse condemnation actions brought under both the federal and state constitutions. The court applied preclusion to two issues–whether the Seminary had a common law right before DNR gained jurisdiction to build its planned replacement tower, and whether that right had been taken unconstitutionally without compensation by the permit denial–that were never considered in any prior forum, despite the Seminary's repeated efforts to raise both issues during the permit proceeding.[8/] To reach this result, the court of

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rejected on four separate occasions in the district court, and was not adopted by the court of appeals, which instead created an implied estoppel theory never previously suggested by DNR or anyone else.

8/ Even before the contested case hearing on the permit, the Seminary raised its federal and state taking claims in a motion to the administrative law judge ("ALJ"). DNR in response argued that the proceeding was "not the proper forum for determining whether [a permit denial] would constitute a taking," and that "[i]f after its proceeding the Commissioner concludes that a permit cannot be issued, then [the Seminary] may bring an action in district court to determine taking issues and valuation." The ALJ adopted DNR's arguments as the basis for denying the Seminary's motion. Relying on this ruling, and because the contested case was limited to statutory questions concerning the environmental impact of the proposed tower, the Seminary did not present its taking evidence in the hearing. Nonetheless, the Seminary continued to note its federal and state taking claims in its post-hearing pleadings to the ALJ, DNR Commissioner and reviewing court of appeals. DNR in each instance successfully responded with the same objections that there was no jurisdiction to consider the taking claims and that they were premature. *See Central Baptist I*, 370 N.W.2d at 649 (expressly declining to address the Seminary's constitutional claims because they were not considered by the ALJ or DNR Commissioner). The Seminary also specifically argued in the permit proceeding that under Minnesota common law it had a right to build its tower. The ALJ and DNR Commissioner refused to consider this issue because they concluded that the Seminary's property was at all times subject to DNR jurisdiction. On appeal, the court of appeals refused to affirm this jurisdictional conclusion, which was directly contrary to applicable Minnesota supreme court precedent, *see Pratt v. State, Dep't of Natural*

appeals concluded that by denying the permit under statutory requirements that became applicable to Central Seminary years after it acquired its land, the DNR Commissioner also *by implication* had disposed of the constitutional taking claims *by implicitly* finding the Seminary never had a right to build its tower before the agency gained jurisdiction over the property. The appellate court reached this result even though, in the permit proceeding, the administrative law judges, the DNR Commissioner and the court reviewing the permit denial all declined to reach both the constitutional and common law issues.

3. *The Minnesota Supreme Court: Review Denied*

Central Seminary petitioned the Minnesota supreme court to review the court of appeals' decision. The Seminary continued to urge that it had been deprived of its rights to just compensation under both the federal and state constitutions, and raised the conflict with *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 120 L.Ed.2d 798 (1992), which this Court issued after the Minnesota court of appeals' decision.2/ Exercising the discretion provided under Minnesota law, the supreme court declined to accept the Seminary's petition. (App. E.) The

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Resources, 309 N.W.2d 767, 770 & n. 3 (Minn. 1981), and ruled that it need not consider the Seminary's common law rights in finding that the permit denial was valid under the statutory provisions applicable in 1984. *Central Baptist I*, 370 N.W.2d at 646. In sum, at no time in the permit proceeding was there ever any consideration of either issue in the inverse condemnation action–whether the Seminary had a common law right to build its planned replacement tower, and whether the permit denial constituted an unconstitutional taking—to which the court of appeals in *Central Baptist II* applied preclusion.

2/ Minnesota appellate procedure did not permit the Seminary to seek rehearing in the court of appeals to draw *Lucas* to that court's attention. *See* Minn. R. Civ. App. P. 140.01.

supreme court provided no explanation for its decision in its one-sentence order denying review.

REASONS FOR GRANTING THE WRIT

The decision of the Minnesota court of appeals departs dramatically from the protection against confiscatory takings provided by the Fifth and Fourteenth Amendments, as well as the taking principles established by this Court and other courts across the country. There are two reasons for granting the writ which merit particular consideration.

I. The Court Of Appeals Has Completely Deprived The Seminary Of Any Opportunity To Have Its Rights Under The Fifth Amendment Considered

The Fifth Amendment's Just Compensation Clause, which applies to the states through the Fourteenth Amendment, provides: "nor shall private property be taken for public use, without just compensation." U. S. Const. amend. V. This Court has recognized for decades that regulation which "goes too far"—that is, which precludes all economic use of private property—violates the Fifth Amendment. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922); *see First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 311–22 (1981) (*"First Lutheran Church"*) (summarizing the Court's regulatory taking jurisprudence). The Court often has repeated Justice Holmes' admonition in *Mahon*, 260 U.S. at 416, that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." The decision of the Minnesota court of appeals, however, in holding that an administrative permit denial estopped Central Seminary's inverse condemnation action, effectively eviscerates the

Fifth Amendment's requirement that just compensation be paid for confiscatory regulatory action.

A. *The Court Of Appeals Improperly Substituted A Police Power Inquiry For The Just Compensation Requirements Of The Fifth Amendment*

This Court has emphasized that government regulation may violate the Fifth Amendment even if it represents a valid exercise of police power under applicable legislation.10/ The Minnesota court of appeals improperly discarded this essential distinction between the police power issue of whether an agency's regulatory action is a statutorily valid exercise, and the taking question of whether that regulation, even though a valid police power action, nonetheless contravenes Fifth Amendment limits and requires compensation.

Although the Court generally has not developed any set formula for determining when regulation is constitutionally excessive under the Fifth Amendment, it has, as reaffirmed last Term, "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 120 L. Ed.2d 798, 812 (1992). The first category involves physical invasion of private property; the second—the one applicable

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10/ The reason for this distinction between the police power and taking inquiries has been clearly articulated:

> This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First Lutheran Church, 482 U.S. at 315 (original emphasis).

here—"is where regulatory action denies all beneficial or productive use of land." *Id.* at 813; *see also First Lutheran Church*, 482 U.S. at 321 ("[W]here the government's activities already have worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation when the taking was effective."); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (The Fifth Amendment is violated when regulation "denies an owner economically viable use of his land.").

In *Lucas*, the Court articulated three reasons for the *per se* rule requiring compensation for regulatory action eliminating all economic use of private property: First, the justifications for the exercise of police power–*e.g.*, that in regulating, a governmental body is merely adjusting the benefits and burdens of economic life to secure *reciprocal advantages*, and that all regulation *to some extent* limits private prerogatives–are less compelling when all productive or economic use of private property is denied. *Lucas*, 120 L.Ed. at 814. Second, when regulation leaves a landowner with no economically beneficial use of its land, there is "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* Third, from the government's perspective, the public benefits secured are just as great from regulatory action prohibiting all private use as from actual condemnation. *Id.* at 814–15. Each of these rationales for the strict Fifth Amendment prohibition against uncompensated regulatory action precluding all economic use of property strikes home in this case.

The district court correctly applied this Court's taking jurisprudence by holding that DNR's permit denial, while a valid exercise of state police power, nonetheless violated the Fifth Amendment by requiring Central Seminary to keep its land economically idle. In conclusions unchallenged on appeal, the district court stated that

"[t]here is no reasonably beneficial or economically feasible use to which the Seminary can put its Jones Lake property in light of applicable DNR regulations," and "the Seminary has been denied all substantial and reasonable use of its property solely by virtue of the DNR's permit denial." (App. B at A–47.) The district court further concluded, again without challenge on appeal, that DNR's action prohibiting the planned tower, the only economically and physically feasible use of the land, without paying any compensation, "has extracted public benefits from the Seminary in furtherance of its wetlands policy;" that the Seminary "received no benefit whatsoever from the permit denial;" and that "[t]he Seminary, as compared to the public at large, has been uniquely burdened by DNR's furtherance of its wetlands policy." (App. B at A–47-48.)

The Minnesota court of appeals, however, nowhere addressed these district court conclusions, which dispose of the federal taking issue under the *per se* rule of *Lucas*. The court of appeals instead held that Central Seminary's taking claim was gone even before it was–or could be–asserted, disposed of once and for all when the DNR Commissioner denied the permit application on the statutory ground that the planned tower would be "detrimental to significant fish and wildlife habitat." *Central Baptist II*, 487 N.W.2d at 532. (App. A at A–9.) The appellate court concluded that the permit denial on this public interest basis estopped, *albeit implicitly*, any further consideration of the Seminary's taking claim, even though the ALJ, the DNR Commissioner and the reviewing court declined, *expressly*, to address the taking issue when it was raised in the permit proceeding. *See* note 8 *supra*.

The court of appeals' approach is in error and should be corrected by this Court. It impermissibly collapses the separate police power and taking inquiries into a single question of whether, based on the potential avian

mortality associated with the planned radio tower, DNR validly denied Central Seminary's permit application under the standards of the statute and rules enacted years after the Seminary acquired its land. As *Lucas and First Lutheran Church* make clear, however, the pertinent inquiry under the Fifth Amendment was the one made by the district court: did DNR's regulatory action deprive Central Seminary of all reasonably beneficial or economically feasible use of its land? With regard to that question, nobody disputes the lower court's finding that DNR has eliminated all productive uses. The court of appeals' inquiry into the public interest justification for the permit denial simply is not relevant to the taking issue when, as here, regulatory action denies all use of private property. *Lucas* , 120 L. Ed. at 812-15; *First English Church*, 482 U.S. at 316–19, 321.

Not only does the court of appeals' opinion conflict with this Court's precedent, it cannot be reconciled with the taking decisions of other courts across the land.11/ Two cases merit particular note. One is a federal court case from Minnesota, *Formanek v. United States Army Corps of Engineers*, 26 Ct. Cl. 332 (1992), decided at nearly the same time and under similar facts as this matter. In *Formanek*, the court of claims held that the Corps' permit

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11/ Federal and state courts applying the Just Compensation Clause routinely distinguish between the police power and regulatory taking inquiries, as evidenced by numerous cases in which Fifth Amendment taking violations have been found despite valid police power regulation. *See, e.g., Yancy v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (livestock quarantine); *A.A. Profiles, Inc., v. Fort Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988) (property zoning); *Florida Rock Inds. v. United States*, 791 F.2d 893, 898-900 (Fed. Cir. 1986) (wetlands restriction), *cert. denied*, 479 U.S. 1053 (1987); *Formanek v. United States*, 26 Cl. Ct. 332, 341 (1992) (wetlands restriction); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 396 (1988) (wetlands restriction); *Albrecht v. Florida*, 444 So. 2d 8, 12 (Fla. 1984) (wetlands restriction); *Annicelli v. South Kingston*, 463 A.2d 133, 139 (R.I. 1983) (shoreline conservation requirement).

denial with respect to a planned development in a wetland, based on regulations first applied to the property after it was acquired, effected an unconstitutional taking under the Fifth Amendment. *Id.* at 334, 341. The court did not find that the public interest justification for the permit denial defeated or estopped the landowner's constitutional claim, nor did it conclude that the permit denial required by current regulatory standards had any relevance to the owner's right under Minnesota common law to proceed with his project before changes in statutory requirements made his property subject to the Corps' jurisdiction.

The other case of note is the leading decision addressing the estoppel argument advanced here by the Minnesota court of appeals. In *Albrecht v. State of Florida*, 444 So.2d 9, 12 (Fla. 1984), the Florida Supreme Court, in affirming the lower court's taking ruling, stated:

> It is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). In addition, the facts necessary to maintain the taking action are different. There must be a diminution in value of the property as well as a lack of alternative uses. *See Pennsylvania Coal Co.* and *Estuary Properties*. Under a constitutionally valid statute providing for protection of the public welfare, those facts are irrelevant to the determination of propriety of the agency action. The first duty of the agency is to protect the public in compliance with the law, whether or not that results in inability to use the property. Neither the doctrine of res judicata nor estoppel by judgment

> apply to this case because the second cause of action is not the same as the first and the issues now presented were not actually litigated in the previous proceeding.

Accord Corn v. Lauderdale Lake, 904 F.2d 585, 587 (11th Cir. 1990) (relying on *Albrecht* to find taking claim challenging zoning ordinance not barred by *res judicata*).

The Minnesota court of appeals did not address this sound reasoning, which applies the Fifth Amendment as this Court has directed. The Minnesota court's impermissible collapsing of police power and taking inquiries into a single issue should be corrected.

B. *The Court of Appeals' Estoppel Theory Precludes A Landowner From Ever Asserting An Inverse Condemnation Claim*

Not only did the Minnesota court of appeals improperly substitute a police power inquiry for the taking analysis required by this Court, the appellate court's approach impermissibly precludes a landowner from ever asserting an inverse condemnation claim. The Fifth Amendment guarantees a landowner the right to "bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" *First Lutheran Church*, 482 U.S. at 315, *quoting United States v. Clarke*, 445 U.S. 253, 257 (1980). In *Jacobs v. United States*, 290 U.S. 13, 16 (1933), the Court further explained the constitutional basis for the federal right to prosecute inverse condemnation claims:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by*

the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the result. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because the duty to pay was imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States*. (Emphasis added).

By holding that Central Seminary was estopped from asserting its taking claim, the Minnesota court of appeals took away the right to seek compensation guaranteed by the Fifth Amendment and this Court. In effect, the court repealed a constitutional right. The Seminary has been precluded from raising its constitutional claim in both its inverse condemnation action, and in the prior administrative proceeding–despite raising the claim repeatedly there–on which the court relies for its implied estoppel theory. *See* note 8 *supra*.

The theoretical basis of the Minnesota appellate court's analysis, moreover, has devastating implications for the just compensation requirements this Court has sought to protect against repeated state regulatory encroachment. Those implications are particularly apparent when the court of appeals' implied estoppel theory (with its underlying police power justification for finding no taking) is considered in light of this Court's requirement that inverse condemnation claims are subject to an administrative exhaustion requirement.12/

12/ The Court has ruled several times that before a taking claim can be asserted, state administrative remedies must be exhausted to ensure that the regulatory action is complete and the confiscatory effect, if any, of that action can be determined. *MacDonald, Sommer & Frates v. Yolo*

Under the Minnesota appellate ruling, regulatory action, if justified by newly–enacted statutory provisions, estops a landowner's taking claim. That claim in turn cannot be asserted under this Court's exhaustion requirement until the administrative agency charged with the unconstitutional action has made its regulatory action final. The result is that the agency in effect becomes its own constitutional arbiter. It decides whether its regulation complies with the Fifth Amendment, subject only to judicial evaluation of whether its conduct represents a valid exercise of police power––a determination subject to substantial judicial deference. *See Central Baptist I*, 370 N.W.2d at 648 ("We recognize that an agency decision enjoys a presumption of correctness and that we should defer to its expertise.").

This anomalous result is made more peculiar when an agency, under the Minnesota court of appeals' implied estoppel theory, can dispose of a taking claim without even considering the constitutional questions in the administrative proceeding. The result is made even more pernicious here by the fact that DNR deliberately prevented any consideration of the Seminary's taking claims by non–agency adjudicators, specifically the ALJ and the reviewing court in the permit proceeding, by successfully arguing that the constitutional issues must be resolved in a subsequent district court action. *See* note 8 *supra*.

In sum, the ultimate injury from the Minnesota decision is to the Fifth Amendment. An agency may commit a taking without ever considering the constitutional limits on its regulatory action, and then estop a landowner from ever having its taking claim heard by a court in a later inverse condemnation action. If this result is permitted to stand, administrative agencies

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County, 477 U. S. 340, 351–52 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U. S. 172, 188-94 (1985); *San Diego Gas & Elec. Co. v. San Diego*, 450 U. S. 621, 631-32 (1981).

across the United States will freely use this Minnesota decision to ignore the taking jurisprudence of this Court.

II. The Court Of Appeals' Decision Conflicts With This Court's Holding In *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 120 L.Ed.2d 798 (1992)

The Minnesota court of appeals' decision directly conflicts with the command of *Lucas*, 120 L.Ed.2d at 823, that to defeat a taking claim like the one here, a state "must identify background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found." The court of appeals declined to require this showing from DNR. Instead, the appellate court found Central Seminary had no right to assert its Fifth Amendment claim because its proposed use of its land was neither "reasonable" nor promoted the "public welfare" within the meaning of the Minnesota statutory restrictions enacted after the Seminary acquired its property. *Central Baptist II*, 482 N.W.2d at 532. (App. B at A-9-10.) In so ruling, the Minnesota court directly contravened this Court's admonition in *Lucas*, 120 L.Ed.2d at 822-23, that the Fifth Amendment requires a state to "do more than proffer the legislature's declaration that the uses [the landowner] desires are inconsistent with the public interest."

Although Central Seminary believes there is no dispute here regarding the relevant state common law, the Court need not address those background principles. The only question is whether, as the Seminary believes, that background law is controlling under *Lucas*. Under that decision, which preceded the Minnesota court of appeals' ruling, this Court should remand to require the Minnesota appellate court to determine whether the district court correctly concluded that the Seminary's rights under the common law in effect when it acquired

its property were taken without compensation by DNR's permit denial.

A. *The Court Of Appeals Did Not Apply The "Total Taking" Test Required By Lucas*

When Central Seminary acquired its property, DNR then had no jurisdiction over the wetland there, and the Seminary was not subject to any of the use restrictions under Minn. Stat. ch. 105 (1961). *See* note 2 *supra*. The district court, therefore, evaluated whether Central Seminary had a right to reconstruct its tower under the relevant common law standard provided in *Johnson v. Seifert*, 257 Minn. 159, 168–69, 100 N.W.2d 689, 696–97 (1960), which provides that the owner of land beneath or abutting shallow surface waters "has a right to make . . . use of a lake over its entire surface, in common with all other abutting owners, *provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of the other existing owners* . . . regardless of the ownership of the bed thereof." (Emphasis added.) Because the planned tower would not interfere with owners of property adjacent to the wetland or other persons, the district court concluded that the Seminary had a common law right to build the tower which the permit denial subsequently extinguished. (App. B at A–44-46.)

The court of appeals, however, expressly declined to make this common law inquiry. The permit denial under the newly–applied statutory restrictions, the court said, implicitly estopped its consideration of Central Seminary's common law rights simply because both Minn. Stat. § 105.45 and the *Johnson* rule contained "reasonableness" elements. *Central Baptist II*, 487 N.W.2d at 532 (App. A at A–7, 9-10). The court asserted–without even considering the district court's application of its findings to the controlling background nuisance and

property law principles–that the Seminary had no right to build its tower because the project would be, as found in *Central Baptist I*, in violation of Minn. Rule 6115.0210 (1984) and Minn. Stat. § 105.45 (1984) (requiring permit applicant to prove proposal is "reasonable" and will "promote the public welfare"). *Central Baptist II*, 487 N.W.2d at 532 (App. A at A–9-10.) The court of appeals made no attempt to consider separately, as the district court did, whether the Seminary had a right to build its tower under the relevant common law principles in effect when the land was acquired. The appellate court unambiguously stated:

> We decline any implicit invitation by the Seminary to conclude "reasonable" or "public welfare" under Minn. Stat. § 105.45 signifies anything different than what is "reasonable" or in the "public welfare" in general.

Central Baptist II, 487 N.W.2d at 533.[13] (App. A at A–11-12.)

Lucas, of course, requires precisely the inquiry the court of appeals declined to make.[14] The central theme

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[13] Contrary to the court of appeals' suggestion, Central Seminary's invitation to the court to consider the differences between the common law and statutory standards was not "implicit." The Seminary urged directly and repeatedly in its appellate briefs and at oral argument that the common law permitted its tower precisely because it was different from the subsequently–applied statutory restrictions barring the project.

[14] The court of appeals observed in a footnote that if it were to consider whether Central Seminary's rights to build its tower were the same at common law and under the subsequently–enacted "public waters" statute, it would be inclined to answer yes. *Central Baptist II*, 487 N.W.2d at 533, n. 5. (App. A at A–12.) Such dicta is, of course, no substitute for the actual inquiry required by *Lucas*, and is even less helpful than usual here, because the court of appeals directly refused to make the required inquiry, and because its summary speculation contained no analysis of

of *Lucas* is that there is a crucial difference for Fifth Amendment purposes between what *was* permissible (or "reasonable") under the common law and what *is* permissible (or "reasonable") under later-enacted environmental protection statutes. That difference exists because under the "historical compact [between government and its citizens] recorded in the Takings Clause," private property cannot be confiscated for public benefit based on this type of evolution in thinking (and resulting changes in law) as to how a state's interests are best served. To give effect to these principles, *Lucas* emphasized that newly-enacted restrictions precluding all productive use of property will effect an unconstitutional taking unless they "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." 120 L.Ed.2d at 821.

The Minnesota court of appeals completely failed to follow these *Lucas* requirements, as is highlighted by the contrast between its opinion and the district court's decision, which anticipated *Lucas'* analysis with remarkable prescience. Effectively employing the "total taking"analysis mandated by *Lucas*, the district court based its finding of an unconstitutional taking on background principles of state property and nuisance law, not on DNR's regulatory scheme that became applicable only after the Seminary bought its land.

Applying the standard from *Johnson v. Seifert*, 257 Minn. 168–69, 100 N.W.2d at 696–97, the district court determined in numerous detailed findings and conclusions that Central Seminary's tower was allowed under common law because it would not encroach on or interfere with the property rights, uses, or enjoyment of

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the district court's detailed findings and conclusions applying the established common law principles.

any other landowners; would not create a nuisance or injury to anyone; would not cause any adverse health or welfare impacts; and would be safe and unobtrusive, indeed safer than its predecessor tower regarding which there were no complaints. *See* Findings 111–114; Conclusions 5–8. (App. B at A–34, 45-46.)15/

DNR's appeal challenged none of these findings and conclusions in which the district court–as required by *Lucas*—carefully considered and applied Minnesota's controlling background legal principles in ruling that DNR had deprived the Seminary of a use permitted at common law. This ruling, moreover, is in accord not only with *Johnson v. Seifert*, 257 Minn. at 168–69, 100 N.W.2d at 696–97, but also other Minnesota precedent governing uses of shallow waters not regulated by statute as "public waters."16/ *See Dep't of Natural Resources v.*

15/ Additional findings also relevant under *Lucas'* "total takings" inquiry, 120 L.Ed.2d at 822, included the district court's determinations that DNR has permitted other radio towers to be constructed in state–regulated wetlands; the Seminary acquired its property solely as a radio tower site, and such towers were expressly permitted uses under New Brighton's zoning ordinance in the early 1960s; all landowners adjacent to "Jones Lake" had signed a petition consenting to the original tower, and none objected to the replacement during the application process; and DNR had knowledge of the original tower before it was constructed, but did not object or require a permit. *See* Findings 27-32, 47, 50-51, 56. (App. B at 19, 22-24.)

16/ In early property law cases, for example, wetlands were considered the "common enemy," thought to be impediments to agricultural production and economic development, breeding grounds for disease, and hindrances to transportation. *E.g., Sheehan v. Flynn*, 59 Minn. 436, 445–49, 61 N.W.462, 465 (1894); *see also*, King, "A History of Drainage Law in Minnesota with Special Emphasis on the Legal Status of Wet Lands," U. of Minn. Water Resources Research Center Bulletin No. 106 at 6–16 (Nov. 1980); Note "Preserving Minnesota Wetlands: Plugging the Leaks in Minnesota Water Management Law," 6 Wm. Mitchell L.Rev. 137, 139–41 (1980). Landowners were actively encouraged, by case law and legislation, to develop, drain or otherwise "rid [their] land of the common enemy known as surface water" as long as they did not create a

Mahnomen County Hearings Unit, 407 N.W.2d 434, 438 (Minn. App. 1987) (holding landowners had a common law right to drain wetlands before they became subject to DNR jurisdiction); *see Pratt v. State, Dep't of Natural Resources*, 309 N.W.2d 767, 770 & n. 3 (1980) (concluding wetlands were not statutory "public waters" under pre–1973 version of Minn. Stat. ch. 105).

Faced with these unassailable facts and law, the Minnesota court of appeals took an easier path than making the constitutionally–required analysis; it simply ignored the question of whether Central Seminary had a common law right to build its tower. Although citing the *Johnson* rule, the appellate court declined to apply the common law standard, concluding instead that the planned tower was impermissible because it violated the fish/wildlife habitat/vegetation standard promulgated by DNR in 1984 in Minn. Rule 6115.0210 (1984). *Central Baptist II*, 487 N.W.2d at 531–32 (App. A at A–9-12.) By applying this statutory standard, the court of appeals avoided the district court's findings, and concluded that the prior permit denial impliedly estopped all issues related to the taking claim even though the ALJ, the DNR

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nuisance or injure others. *Hartle v. Neighbauer*, 142 Minn. 438, 440–41, 172 N.W.498 (1919); *see also*, King, *supra*, at 6–16 and Appendix A. Although courts gradually ceased to apply the "common enemy" rule, more recent cases have continued to recognize landowner rights to drain or develop wetlands, up to the time that statutory changes brought them within DNR's jurisdiction, even if those uses destroyed marshes or contributed to pollution or other adverse environmental effects. *Dep't of Natural Resources v. Mahnomen County Hearings Unit*, 407 N.W.2d 434, 438 (Minn. App. 1987) (holding landowners lawfully drained wetlands not classified as "public waters" under Minn. Stat. ch. 105); *see also, In re Application of Christenson*, 417 N.W.2d 607, 614 (Minn. 1987) (dicta) (suggesting that before DNR gained jurisdiction over wetland, landowner could drain water even though drainage would release pollutants to nearby lake).

Commissioner and the reviewing court refused to address those issues in the permit proceeding.[12] *See* note 8 *supra*.

With this analysis, the court of appeals destroyed the essential purpose of *Lucas'* "total taking" standard, which makes the Fifth Amendment inquiry dependent on background nuisance and property law restrictions applicable at the time a landowner acquired its property, not statutory public interest determinations made years later. The sophistry and semantics used by the Minnesota court of appeals in declining to determine the Seminary's rights under the controlling common law are no substitute for adherence to the constitution. This Court made that clear in *Nollan v. California Coastal Comm'n*, 483 U.S 825, 841 (1987), when it stated: "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."

Unfortunately, the Minnesota court of appeals' decision–with a rationale the English might call too clever by half–shows little respect for this Court's taking jurisprudence or the Fifth Amendment. This Court should remand to require the Minnesota court of appeals to conduct the inquiry into common law rights required by *Lucas*.

CONCLUSION

The court of appeals' erroneous decision has serious implications. It is another example of how creative courts resist the unpalatable task of making popular state

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12/ The court of appeals recognized that if it is required to consider separately Central Seminary's common law rights, then the permit proceeding could not provide a basis for applying estoppel under settled Minnesota preclusion law. *See Zontelli v. Smead Mfg. Co.*, 343 N.W.2d 639, 641 (Minn. 1984) (when an adjudication reserves an issue from judgment, there can be no estoppel with respect to that question).

agencies pay for property taken through the exercise of their administrative powers.

The Court is aware of this difficulty. It declined in *Lucas* to adopt South Carolina's nuisance rationale and in *Nollan* to accept California's public purpose justification because the taking defenses asserted in those cases, with their reliance on elastic labels detached from hard facts, could swallow up the protection guaranteed by the Just Compensation Clause. The Minnesota appellate court's implied estoppel theory creates a similar threat to private citizens' rights to compensation guaranteed by the Fifth Amendment.

The threat is particularly serious because environmental protection statutes are routinely premised on the reasonableness and public welfare determinations underlying the Minnesota statute involved here. Likewise, the common law nuisance and real property principles of most, if not all, states contain reasonableness considerations such as those in Minnesota.[18/] If, as the Minnesota court of appeals would allow, governmental entities are permitted to rely solely on such labels to defeat taking claims based on the public interest considerations underlying newly-enacted statutory restrictions, the Just Compensation Clause as defined by this Court may become a quaint historical artifact.

18/ *Compare* N.Y. Envtl. Conserv. Law § 25-0403 (McKinney 1992) (wetland use permit granted if compatible with "public health and welfare") *and* Cal. Water Code § 1227.2 (West 1992) (water use permit granted if "in the public interest") *with Greentree at Murray Hill v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 988 (N.Y. Sup. 1989) ("unreasonable" interference with right to use and enjoy land represents nuisance) *and Wolford v. Thomas*, 235 Cal. Rptr. 422, 428 (Cal. App. 1st Dist. 1987) ("unreasonable" interference with rights of others represents nuisance); *see also*, 33 C.F.R. § 325.4 (1992) (factor in Army Corps of Engineer granting wetland permit is satisfaction of "public interest" requirement).

This petition for a writ of certiorari should be granted, and the matter set for briefing and argument. Alternatively, the Court should grant the writ, summarily vacate the court of appeals' decision, and remand the case for proper consideration in light of *Lucas*.12/

Dated: November 25, 1992

Respectfully submitted,

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12/ The alternative disposition would not require the Court to address at this time the question presented in Section I of this petition of whether the Minnesota court of appeals' estoppel ruling deprived petitioner of its Fifth Amendment right to assert an inverse condemnation claim, because there will be no estoppel if the court on remand concludes that the common law differed from the later-enacted statute. If on remand, however, the court determines the statutory and common law standards were not different, then the constitutional issue presented in Section I will remain.

APPENDIX A

CENTRAL BAPTIST THEOLOGICAL SEMINARY,

Respondent,

v.

CITY OF NEW BRIGHTON,

Defendant,

Nos. C5-91-1401, C7-91-1934

State of Minnesota, Department of Natural Resources, et al.,

Appellants.

OPINION

Court of Appeals of Minnesota.
June 23, 1992

COUNSEL

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Hubert H. Humphrey, III Atty. Gen., August W. Clapp, III, Donald A. Kannas, Sp. Asst. Attys. Gen., St. Paul, for City of New Brighton, defendant, State of Minnesota, Dept. of Natural Resources, et al., appellants.

Mark T. Johnson, Stephen J. Snyder, Carla J. Pederson, Winthrop & Weinstine, St. Paul, for amici curiae Sierra Club, et al.

Considered and decided by AMUNDSON, P.J., AND HARTEN, and MULALLY,*/ J.J.

OPINION

AMUNDSON, Judge.

Respondent's radio tower, built on upland with guy wires anchored in Jones Lake, was destroyed in a 1980 windstorm. Respondent subsequently secured all necessary permits to build a new tower in Jones Lake, except the permit required from appellant Department of Natural Resources (DNR). This court affirmed the DNR's refusal to issue the permit. *See In re Central Baptist Theological Seminary*, 370 N.W.2d 642 (Minn.App.1985), *pet. for rev. denied* (Sept. 19, 1985). Respondent then sued the DNR, alleging, among other things, a constitutional "taking" and requesting mandamus to compel condemnation of the property. After a bench trial, the trial court found a "taking," ordered condemnation proceedings, and required the DNR to pay respondent's relocation and related expenses. That judgment, and a separate judgment requiring the DNR pay the respondent's attorney fees were separately appealed. The appeals were consolidated. This court granted leave for amici curiae, the Sierra Club, Project Environment Foundation, and St. Paul Audubon Society to participate in the appeal. We reverse because the seminary is collaterally estopped from relitigating the reasonableness of building the radio tower.

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*/ Retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

FACTS

In 1963 respondent Central Baptist Theological Seminary (the seminary) purchased the land underlying Jones Lake intending to build a radio tower in the lake. After installing a cement base for the tower in the lake, the seminary entered an agreement with a radio company to construct a tower on adjacent upland, guy the tower in the lake, sell the land and tower to the radio company, and receive rent-free use of a space on the tower for 99 years.

The tower was used until August 1980 when it was blown over by a windstorm. The seminary then started temporary broadcasting from an alternative location with less range. The tower's owner abandoned replacement attempts because of the cost and New Brighton's rejection of its building permit application. New Brighton subsequently increased its set-back requirements thereby prohibiting construction of a tower on the upland.

The seminary then entered an agreement with a second radio company. The seminary would lease its land to the company and procure the necessary permits while the company would construct a tower. The seminary agreed to assist the company in obtaining a permit from appellant Department of Natural Resources (DNR). In 1982, however, New Brighton and the DNR denied the seminary's permit requests. The DNR's denial was heard as a contested case and this court affirmed the permit denial. *See In re Central Baptist Theological Seminary*, 370 N.W.2d 642 (Minn.App.1985), *pet. for rev. denied* (Minn. Sept. 19, 1985) (hereinafter *Central Baptist I*). Since then, the seminary has researched possible options for replacement of the destroyed radio tower and entered a $3.5 million, 41-year lease with KTWN to rent a spot on that tower.

In 1987 the seminary sued the DNR and the City of New Brighton, alleging the permit denials for the radio

tower amounted to a constitutional "taking" of its Jones Lake property. The seminary also requested mandamus to compel condemnation of the property. A year later, New Brighton obtained summary judgment when it agreed to allow the seminary to build the Jones Lake radio tower. The seminary previously sold the upland parcel when the city changed its set back requirements to effectively prohibit the seminary from rebuilding its tower there.

Prior to trial, the parties stipulated to a $725,000 value for the Jones Lake property with a radio tower, and that the relocation cost for the seminary's broadcasting facilities was $103,202.73. After a bench trial, the trial court found a constitutional "taking" had occurred. Further, the trial court concluded Jones Lake was not subject to DNR jurisdiction as a "public water" when the seminary acquired the property in 1963, and therefore the seminary had a pre-existing right to build a radio tower on the property. The trial court also found that constructing the proposed tower in Jones Lake would neither harm the natural habitat nor interfere with the riparian rights of other persons. Accordingly, the trial court ordered the DNR to pay just compensation, the seminary's reasonable litigation expenses and stipulated relocation costs. The DNR was also held liable for the seminary's attorney fees.

ISSUES

1. Are a riparian owner's rights regarding riparian property limited to riparian rights?

2. Is respondent collaterally estopped from arguing the reasonableness of building a radio tower?

ANALYSIS

Under the United States and Minnesota Constitutions, taking private property for public use requires "just

compensation." *See* U.S. Const. amend. V; Minn. Const. art. I, § 13; *Chicago, B & O R.R. Co. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897) (fifth amendment "just compensation" requirement applicable to states via U.S. Const. amend. XIV).

I.

Under Minn.Stat. § 105.38(1) (1984) "[s]ubject to *existing rights* all public waters and wetlands are subject to the control of the state." (Emphasis added.) Because "existing rights" refers to "riparian rights," *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767, 772 (Minn. 1981), and because riparian rights are the rights to use and enjoy water, *see Johnson v. Seifert*, 257 Minn. 159, 164, 100 N.W.2d 689, 694 (1960), this court's analysis in *Central Baptist I* concluded:

> Building a radio tower is not a riparian right * * * The Commissioner did not err by concluding the seminary had no existing right to build a radio tower.

Central Baptist, 370 N.W.2d at 646. Based primarily on this passage, the DNR argues the seminary is collaterally estopped from asserting a right to build a radio tower because the issue was decided in *Central Baptist I* when this court ruled respondent had no riparian right to build a radio tower. While we ultimately conclude the seminary is collaterally estopped from asserting its right to build a Jones Lake radio tower, we do not reach this conclusion because the seminary's rights regarding its property are limited to riparian rights. 1/

1/ Our ruling in *Central Baptist I* was not based on the assumption that a riparian owner's rights regarding riparian property are limited to riparian rights. Specifically, by tracking the statutory "existing rights" language of Minn.Stat. § 105.38(1), *Central Baptist I* narrowed its focus to

The seminary argues that under *Johnson*, it had a right to construct the tower prior to Jones Lake becoming a wetland under Chapter 105. *Johnson* states:

> [W]e expressly overrule *Lamprey v. Danz* * * * and hold that an abutting or riparian owner of a lake * * *

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riparian rights for most of its discussion of the issue. *See Central Baptist I*, 370 N.W.2d at 646. The last paragraph of the discussion, however, states:

> The seminary contends the supreme court erred in *Pratt* by defining existing rights as riparian rights. It argues that Minn.Stat. § 105.38(1) expressly protects all *existing rights* without limitation and that it has an *existing right* to build a tower in Jones Lake which is similar to the right one has when one has a non-conforming use subject to local zoning requirements. A non-conforming use is an actual use. The seminary's only use of Jones Lake was for an easement to Contemporary Radio for two anchor piers. The lake was not actually used for a radio tower. Thus, the seminary's non-conforming use argument lacks substance.

Central Baptist I, 370 N.W.2d at 646-47 (citation omitted; emphasis added). In the quoted paragraph the emphasized "existing rights" phrases refer not just to riparian rights, but to all rights the seminary had to Jones Lake before it became subject to Minn. Stat. § 105.38(1). Thus, part of the seminary's argument in the first appeal was that it had a nonriparian right to build the radio tower, and that because that right was obtained and partially invoked before the lake was subject to the statute, it was protected, or "grandfathered in," by Minn.Stat. § 105.38(1). Respondent made its argument to this court through the "non-conforming use" analogy.

In addressing the seminary's claim, we ruled the prerequisites for the alleged analogy were not present and rejected the analogy. While respondent lost the prior appeal, by rejecting the analogy rather than the underlying idea of a nonriparian right, we did not reject the idea the seminary may have a nonriparian right to build a radio tower in Jones Lake. We note, the presence of nonriparian rights in riparian property is not inconsistent with prior authority. *See e.g., In re Christenson*, 417 N.W.2d 607, 614 (Minn. 1987) (recognizing possible application of non-conforming use doctrine to a riparian party); *Pratt*, 309 N.W.2d at 772 n. 6 (recognizing when a riparian owner may exclude others from public waters).

> has a right to make * * * use of a lake over its entire surface, in common with all other abutting owners, *provided such use is reasonable* and does not unduly interfere with the exercise of similar rights on the part of the other abutting owners * * * *regardless of the ownership of the bed thereof.* It does not follow that the foregoing riparian rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game.

Johnson, 257 Minn. at 168-69, 100 N.W.2d at 696-97 (emphasis added.) Apparently assuming the *Johnson* pothole/swamp exception would allow construction of a radio tower and that Jones Lake would fall into that exception, the seminary argues the legislature's elimination of this exception noted in *Central Baptist I*, 370 N.W.2d at 646, occasioned a taking. We are not persuaded this is the case.

Initially, the *Lamprey* decision overruled by *Johnson*, held that an owner of a lake bed could preclude persons from using the water above the owned property. *Lamprey v. Danz*, 86 Minn. 317, 321, 90 N.W. 578, 580 (1902). Further, any pre-existing right to build on a lake or stream bed has always been restricted in a manner consistent with the "reasonable use" caveat mentioned in *Johnson*:

> [O]wnership of any land interest in the bed of any stream or lake * * * can properly be held to be qualified ownership for the *service of the public welfare.*

1 Richard Powell, *Powell on Real Property* ¶ 160 at 10-44 (1992) (emphasis added); *see also* 78 Am.Jur.2d, *Waters* § 393 (1975) (riparian owner's right to build on lake or stream bed limited by rights to navigation, use and safety of other riparian owners); *see generally, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922) ("[a]s long recognized, some [real property]

values are enjoyed under the implied limitation and must yield to the police power") *quoted in Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473, 107 S.Ct. 1232, 1236, 94 L.Ed.2d 472 (1987). Thus, the crux of the new rule espoused by *Johnson* was that lakebed ownership does not necessarily entitle the owner to exclude persons from the above surface water; the rule is not that owners of small lake beds were exempted from the "reasonable use" restrictions on their property. Therefore, even presuming the seminary is correct and it had nonriparian rights to its Jones Lake property before it became a wetland under Chapter 105, the seminary's nonriparian rights were subject to the reasonableness/public welfare limitations advanced in *Johnson*. Consequently, the critical issue is whether the prior proceedings addressed the reasonableness and public welfare implications of building a radio tower in Jones Lake. For purposes of our analysis we assume respondent had nonriparian rights regarding its Jones Lake property.2/

II.

Collateral estoppel may apply to agency decisions when five factors are met:

1) the issue to be precluded must be identical to the issue raised in the prior adjudication;
2) the issue must have been necessary to the agency adjudication and properly before the agency;

2/ We note that if our assumption is incorrect, the appeal is academic; the only rights a party has regarding riparian property are riparian rights and *Central Baptist I*, 370 N.W.2d at 646 explicitly concluded that "[b]uilding a radio tower is not a riparian right." Thus, there would have been no right to build the tower and the DNR's denial of the permit would not be a taking. *See AFSCME Council 6, 14, 65 & 96 v. Sundquist*, 338 N.W.2d 560, 575 (Minn. 1983).

3) the agency determination must be a final adjudication subject to judicial review;
4) the estopped party was a party or a party in privity with a party to the prior agency determination; and
5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 116 (Minn. 1991) (citations omitted). Here the prior proceeding produced a final ruling subject to judicial review and involved the same parties. Three remaining questions demand our attention.

A. *Central Baptist I: Was the Issue Identical?*

In permit applications the applicant has the burden of proving its project is "*reasonable*, practical and will adequately protect public safety and promote the *public welfare*." Minn.Stat. § 105.45 (1984), *quoted in Central Baptist I*, 370 N.W.2d at 647. If an applicant's proposal would be "detrimental to significant fish and wildlife habitat, or protected vegetation," the application must be denied. *See* Minn.R. 6115.0210, subpt. 3b.

In the prior administrative proceeding, the ALJ concluded:

> Respondent has not proven by a preponderance of the evidence that the proposal is reasonable, practical or that it will promote the public welfare.

We affirmed upon finding "substantial evidence in the record which supports the Commissioner's conclusion that the structure will be detrimental to significant wildlife habitat." *Central Baptist I*, 370 N.W.2d at 648.

Fish and wildlife habitat and protected vegetation have little to do with the public safety or practicality requirements governing Minn.Stat. § 105.45. Thus, an

affirmance of the Commissioner's permit denial could not have been on either of those bases and must have been because the project was unreasonable and/or did not promote the public welfare.3/ The critical issue was presented in the prior administrative and appellate proceedings.

B. *Was the Issue Properly Before the Agency?*

DNR argues it has had no prior opportunity to present its taking claim. While technically correct, this is not dispositive. In *Graham*, a teacher was discharged. When she subsequently sued the school district in tort, the district alleged she was collaterally estopped by school board determinations made in the termination proceeding. In reply to the teacher's allegation that the school board did not have jurisdiction over her tort claims, the supreme court stated:

> True enough, but nobody is making such a claim. The school district is not asking for a res judicata bar; it is asking only for collateral estoppel, *i.e.* for preclusion of certain factual issues which are common to both the termination proceeding and the tort actions.

3/ Whether construction of a radio tower would interfere with the riparian rights of other riparian owners was not explicitly addressed by the ALJ. We note, however, that the affirmance of the permit's denial is consistent with *Central Baptist I*'s observations that "[respondent] acknowledg[ed] that there are other riparian owners of Jones Lake" and that construction of the tower would "interfere with the exercise of riparian rights by [those] riparian owners." *Central Baptist I*, 370 N.W.2d at 646. *See generally State by Drabik v. Martz*, 451 N.W.2d 893, 897 (Minn.App. 1990), *pet. for rev. denied* (Minn. Apr. 25, 1990) (this court affirms trial court's temporary injunction against building a radio tower in the Boundary Waters Canoe Area, noting construction would impair "scenic and esthetic resources").

Graham, 472 N.W.2d at 117.

Here, the reasonable use and public welfare considerations critical to determining whether respondent has a right to build a radio tower in Jones Lake were also critical in the ALJ's determination of whether to issue the permit. Therefore, those issues were properly before the ALJ in the permit proceeding.4/

C. *Full and Fair Hearing*

Because the question whether the construction of a radio tower in Jones Lake was reasonable or promoted the public welfare was critical to the Commissioner's permit decision, the prior proceeding revolved around the assorted facets of those questions. Additionally, there was no allegation in the prior action that respondent was precluded from fully litigating and appealing its proposed tower construction.

We decline any implicit invitation by the seminary to conclude "reasonable" or "public welfare" under Minn.Stat. § 105.45 signifies anything different than what

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4/ The seminary argues the DNR's failure to object to the seminary's first tower, and to other allegedly similar towers not involved in this litigation, should be considered in evaluating the seminary's right to rebuild its destroyed tower. Functionally, this argument appears to be one to equitably estop a determination that the seminary cannot build a new tower. To the extent an estoppel argument is being made, we do not address it in detail here. It does not appear to have been explicitly made to the trial court. *See Gruenhagen v. Larson*, 310 Minn. 454, 457, 246 N.W.2d 565, 568 (1976) (issues not raised to the trial court will not be reviewed on appeal). Moreover, to equitably estop the government, one must meet a high threshold. *See Mesaba Aviation v. County of Itasca*, 258 N.W.2d 877, 881 (Minn. 1977) (county not estopped from collecting taxes even though it had given verbal and written assurances to a lessee that property was not subject to taxation). Arguably, if the affirmative governmental conduct in *Mesaba* is insufficient to justify estoppel, the DNR's failure to object in this case is also insufficient.

is "reasonable" or in the "public welfare" in general.[5/] Thus, because any nonriparian rights possessed by a riparian owner are subject to general reasonableness and public welfare limitations, and because the seminary's proposal to build a radio tower in Jones Lake has been previously determined not to be reasonable or consistent with the public welfare, we must conclude these prior determinations dispose of the seminary's claim that it had a right which was taken by the permit denial. Where there is no right, there can be no taking, and therefore we must reverse the trial court. *Sundquist*, 338 N.W.2d at 575.

DECISION

Exercise of any nonriparian rights a riparian landowner may have is subject to general reasonableness and public welfare limitations. Here, because the prior litigation concluded respondent's attempt to put a tower in Jones Lake was not reasonable or consistent with the public welfare, respondent is precluded from relitigating whether it had a right to build a radio tower in Jones Lake.

Reversed.

5/ Indeed, we note that were we to do so, what is "reasonable" under Chapter 105 regarding water resources would not be generally reasonable.

APPENDIX B

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CONDEMNATION
COURT FILE NO. C487489344

Central Baptist Theological Seminary,

Plaintiff

vs.

City of New Brighton, State of Minnesota, Department of Natural Resources; and Joseph N. Alexander, individually and as Commissioner of Department of Natural Resources,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF JUDGMENT

This matter was tried to the Court on March 19 through 22, 1991. Plaintiff Central Baptist Theological Seminary was represented by Roger J. Magnuson and Gregory A. Fontaine, Dorsey & Whitney, Minneapolis, Minnesota, and Defendants, State of Minnesota, Department of Natural Resources, and Joseph N. Alexander, were represented by Donald Kannas, Special Assistant Attorney General, State of Minnesota, St. Paul, Minnesota. By agreement of the parties, the record in this matter includes all testimony and exhibits admitted in the jury trial on March 4, 1991 before Plaintiff's mistrial motion was granted, as well as the proceedings of March 19 through 22.

Based on all of the testimony and exhibits received into the record, the various memoranda and arguments submitted by counsel, and all other proceedings herein, this Court makes the following findings of fact, conclusions of law and order for judgment:

THE PARTIES

1. Plaintiff Central Baptist Theological Seminary ("Seminary") is a nonprofit corporation duly organized and existing under the laws of the State of Minnesota.

2. Defendant State of Minnesota, Department of Natural Resources ("DNR") is a state administrative agency organized and existing under the laws of the State of Minnesota. DNR is responsible for regulating "public waters" under Minn. Stat. Chap. 103H (formerly 105).

3. Defendant Joseph Alexander was the Commissioner of DNR at the time this lawsuit was commenced. He has been sued in this matter both individually and in his official capacity as DNR Commissioner.

4. The Seminary is affiliated with the Fourth Baptist Church, the Fourth Baptist Christian School and Camp Clearwaters, and operates radio station WCTS-FM. The Seminary, the Church, the school and the radio station are housed in a complex of buildings at 2105 Fremont Avenue North in Minneapolis.

5. Radio station WCTS-FM broadcasts Christian and community-related programming at 100.3 mHz. The station programming includes music, news, religious and biblical programming, community information, family programming and home and financial information.

6. WCTS-FM programming is produced in the Seminary studios in north Minneapolis and sent from a small antenna at the Seminary to a microwave receiving dish mounted on a radio tower now located in Anoka County. The broadcast signal is relayed from the

microwave dish to an antenna mounted on the tower, and the antenna in turn broadcasts the signal to listeners. The Seminary's former tower, which was blown over in 1980, was located on the Seminary's property in New Brighton, Minnesota which is the subject of this lawsuit.

7. WCTS-FM broadcasts under the authority of a class C-1 license granted by the Federal Communications Commission (FCC) at 100,000 watts, the most powerful signal available under an FCC license. The current signal, with certain terrain-related exceptions, reaches approximately 90 miles in all directions.

THE SUBJECT PROPERTY

8. The property that is the subject of this lawsuit consists of approximately 24.6 acres of land in the City of New Brighton (the "City" or "New Brighton") in Township 30 North, Range 23 West, Section 32, SW 1/4 of NE 1/4.

9. The Seminary is the sole owner of the property in New Brighton. The Seminary has a fee simple title with no encumbrances except for a ponding easement held by the City.

10. The Seminary granted the ponding easement to the City in 1964. The City still retains the benefits of this easement.

11. The Seminary has never been paid anything for the City's ponding easement, and currently receives no benefit from this easement.

12. The Seminary's property falls within the City's I-1, I-2, R-3A and R-3B land use zoning classifications.

13. The topography of the Seminary's property is generally level and marshy. Currently, the property mostly consists of 1-1/2 feet of decayed organic matter with an average water depth of .8 feet.

14. About 97 percent (approximately 24 of the total 24.6 acres) of the Seminary's property is within the

boundaries of a DNR designated wetland known as Jones Lake.

15. Jones Lake was designated as a Type IV wetland by the DNR in 1982 pursuant to Minn. Stat. §§ 105.37(14) and (15) (recodified at Minn. Stat. § 103G.005(15) and (18) by 1990 Minn. Laws 391).

16. Because DNR has designated it as a Type IV wetland, Jones Lake currently is classified as a "public water" under Minnesota law, and as such, is now subject to DNR's regulatory jurisdiction.

17. The Seminary's property does not have frontage on any public roadway and is surrounded on all sides by parcels owned by private parties. In short, the property is landlocked except for an easement providing access for radio tower use.

18. Land use surrounding the Seminary's property is primarily light industrial and agriculture. There are nearby tracts of undeveloped land to the south and some multiple and single family housing to the west.

19. The Seminary's property is surrounded by industrial and commercial developments including two highways (Interstate 35W and U.S. Highway 8), truck leasing and hauling operations, power lines, railroad tracks, the 200-foot New Brighton water tower, a mobile home park and various smaller commercial and residential establishments along Highway 8.

FACTS AGREED UPON PRIOR TO TRIAL

20. Certain factual issues in this matter initially were to be tried to a jury. In connection with the anticipated jury trial on these issues, the parties had agreed upon a special verdict form. Immediately prior to trial the parties agreed that the answers to the following special interrogatories which were to be decided by the jury should be entered as findings of fact as if resolved by the jury:

(a) Did the Central Baptist Theological Seminary acquire its property in New Brighton with the intention of constructing a radio tower on that site?

Yes.

(b) With regard to the radio tower constructed by the Seminary in 1964, were any of the tower's guy wires anchored on the property now owned by the Seminary?

Yes.

(c) Did the Department of Natural Resources deny the Seminary's application for a permit to construct a radio tower on the Seminary's property in order to provide or protect public resources?

Yes.

(d) State in dollar terms the market value of the Seminary's property with a radio tower on the site.

$725,000.00

(e) State in dollar terms the relocation expenses, if any, incurred by the Seminary in moving WCTS to the Anoka County tower for each of the following three categories:

Category 1 -- Moving and related expenses: $92,202.73

Category 2 -- Reestablishment expenses: $1,000.00

Category 3 -- Additional Rent in first two years: $493,500.00

21. In addition to the foregoing factual findings with respect to questions from the special jury verdict form, the parties agreed immediately prior to trial that the following findings of fact should be entered:

(a) In the context of engineering and architecture, Plaintiff Central Baptist Theological Seminary could physically construct a radio tower on its

Jones Lake property that is subject matter of this case i.e., it is possible to construct a radio tower as proposed on the Jones Lake property site.

(b) Plaintiff's Jones Lake property would be measurably and significantly more valuable if a radio tower could be constructed on it than if a radio tower could not be constructed.

22. The parties in March 1988, entered into other stipulated facts. Those stipulated facts, which were entered into the record as Plaintiff's Exhibit 70, are incorporated by reference and made a part hereof as further findings of this Court.

THE HISTORY OF THE SEMINARY'S RADIO OPERATIONS AT JONES LAKE

23. Shortly after the Seminary was formed in 1956, its members became interested in establishing a Seminary-owned and operated, nonprofit radio station to broadcast religious programming.

24. The Seminary formed a radio committee to investigate the establishment of a Seminary-owned radio station and to organize and implement plans to achieve that end. The committee's efforts included responsibility for locating a radio tower site and planning and coordinating tower construction.

25. Wallace Anderson, a real estate broker and trustee of the Fourth Baptist Church, was a member of the radio committee and was primarily responsible for the Seminary's search for an appropriate site.

26. Anderson identified the Jones Lake property which is the subject of this lawsuit as a candidate for the Seminary's radio tower in or shortly after 1960. Anderson first located the site for WMIM, an AM radio station that had retained Anderson for his professional real estate services. When WMIM could not complete the

transaction, Anderson brought the site's availability to the attention of the Seminary's radio committee.

27. The radio committee recommended to the Seminary trustees and the then president of the Seminary, Dr. Clearwaters, that the Seminary acquire the Jones Lake property for use as a site for the planned radio tower. The trustees approved this recommendation, and the committee authorized Anderson to proceed with the acquisition of the Jones Lake property.

28. On the basis of this approval, Anderson and his wife, Dorothy Ann, purchased the Jones Lake property in October 1962 from Delmar and Carol Goldeman for $2,500 under a contract for deed.

29. The Andersons' only purpose in purchasing the Jones Lake property was to donate it to the Seminary for the Seminary's use as a site for the planned radio tower.

30. The Andersons then transferred title to the Jones Lake property by warranty deed to the Seminary in April 1963. This transfer was made as a donation without payment to the Andersons.

31. The Seminary accepted the title to the Jones Lake property for the sole purpose of constructing a radio tower. The Seminary had no other use for the site or purpose in accepting title to the Jones Lake property.

32. Once the Jones Lake property was acquired on behalf of the Seminary by the Andersons, the Seminary initiated engineering studies for a radio tower. The initial plan called for the tower to be constructed as a guyed structure located near the middle of Jones Lake. The Seminary's engineers evaluated this plan, and reported to the trustees that construction of the tower in the marsh was feasible from an engineering standpoint. As a result, the Seminary proceeded with preparation of design plans.

33. After the initial design was completed, the Seminary then obtained approvals from necessary governmental agencies, including the City, FCC, and FAA, to construct the proposed tower on the Jones Lake

property. In the winter of 1962-63, to begin implementing the original plan, the Seminary placed a large concrete tower base in the middle of Jones Lake. The concrete tower base still sat in the wetland at the time of trial (and is still there to the best of this writer's knowledge).

34. During the Seminary's preparation for construction of the radio tower in Jones Lake, WAYL-FM, owned by Contemporary Radio, Inc., hereinafter referred to as "Contemporary," contacted the Seminary in 1963 regarding a tower-sharing arrangement by which Contemporary would share the expense of tower construction if WAYL could place an antenna on the Seminary's tower.

35. The Seminary's construction of its radio tower under the original design plan for Jones Lake was delayed while the negotiations with Contemporary were concluded.

36. In the negotiations with the Seminary, Contemporary stressed its need for studio space and proposed that the Seminary acquire property adjacent to Jones Lake to accommodate WAYL's studio. Because of the wet characteristics of the Jones Lake property, a studio could not be built, from a structural standpoint, within the Jones Lake property. The Seminary was not in need of studio space in New Brighton; it produced its programming from its studio in the Seminary's buildings in north Minneapolis.

37. On September 15, 1963, Contemporary and the Seminary reached an agreement on a tower-sharing arrangement.

38. As part of the September 1963 agreement, the Seminary agreed to acquire a parcel of upland (non-marsh) property adjacent to Jones Lake that was approximately two acres. This property included a house that could be used for the WAYL studio and transmission facilities. Wallace Anderson located this property, which

is known as the "Blanski" parcel, on behalf of the Seminary.

39. Acting on behalf of the Seminary, and with direction from the Seminary's trustees, Wallace and Dorothy Ann Anderson in May 1964 purchased this upland property from John and Audrey Blanski for $19,500. The Blanskis transferred the property to the Andersons by warranty deed.

40. The Andersons borrowed the necessary funds to purchase the Blanski property, and then in October 1964 transferred the property to the Seminary, which made the mortgage payments. Contemporary, the Blanskis and the Andersons' lenders were aware of these arrangements between the Andersons and the Seminary.

41. As with the acquisition of its Jones Lake property, the Seminary had no purpose in acquiring the Blanski parcel except as a site for the radio tower. The Andersons had no intention in purchasing the Jones Lake or Blanski properties other than to facilitate the construction of the Seminary's radio tower.

42. Under the September 1963 tower-sharing agreement, Contemporary agreed to pay the Seminary $26,000 plus the tower construction costs (which were approximately $50,000). Contemporary also agreed to give the Seminary a 99-year rent-free lease for antenna space on the tower to be constructed by the Seminary and for space in the transmitter building then existing on the Blanski property. In return, Contemporary was to receive title to most of the Blanski property and the radio tower. The Seminary also received a 10-foot easement from Contemporary across the Blanski property for radio tower use and maintenance.

43. The Contemporary-Seminary transaction did not involve the Seminary's ownership of Jones Lake. The Seminary remained fee owner of the Jones Lake property.

44. As a result of the Contemporary agreement and the acquisition of the Blanski property, the Seminary

modified its original tower plan to locate the base for the tower frame onto the Blanski property, where WAYL could use the existing building for its studio and transmission facilities and the tower construction costs were less than in the middle of Jones Lake.

45. The Seminary then proceeded to construct a 460-foot tower held up by four sets of guy wires. The tower frame and base were built on the Blanski property. Two of the sets of guy wires were anchored on the Blanski property; the other two sets were anchored within Jones Lake. Because of the small size of the Blanski property, it was not possible to locate all guy wires and anchors on that parcel. Thus, the complete tower, including the base, frame, guy wires and guy anchors, straddled the two parcels of property, one (the Blanski parcel) owned by Contemporary, and the other (Jones Lake) owned by the Seminary under the terms of their 1963 agreement.

46. The Seminary completed construction of the tower in 1964. Completion of the tower allowed the Seminary to broadcast at 80,000 watts, the full power then licensed by the FCC, beginning in 1964.

47. The City required and approved the Seminary's application for a special use permit for constructing the tower frame and guy wires located on the Blanski property. The City also required and approved the Seminary's application for rezoning the Blanski property from residential to industrial to allow the tower to be built. Wallace Anderson petitioned neighbors owning property adjacent to Jones Lake for their approval of this rezoning. None of the neighbors objected to construction of the tower.

48. In addition to the special use permit and rezoning needed for the Blanski parcel, the City required and approved the Seminary's application for a separate special use permit for the guy anchors to be located in Jones Lake. As a condition of granting this second special use permit, the City required that the Seminary grant the

City a ponding easement to allow additional runoff to be discharged into Jones Lake. The Seminary granted the easement in order to receive the necessary special use permit to build the tower.

49. All necessary permits and approvals, including those from the City, FCC and FAA, were obtained before tower construction began in 1964.

50. DNR records indicate that the Department was informed of the construction plans to build a radio tower anchored in Jones Lake before the tower was built in 1964.

51. DNR did not require a permit for the tower constructed by the Seminary, nor did the Department object to or even contact the Seminary regarding either the initially-planned tower in Jones Lake for which the tower base was placed in the marsh in 1962-1963, or the subsequent construction of the tower with guy wire anchors that were placed both within Jones Lake and on the Blanski parcel.

52. In compliance with the terms of its September 1963 agreement with Contemporary, the Seminary -- after obtaining the necessary governmental approvals and constructing the tower -- transferred most of the Blanski property and the completed tower to Contemporary. Under the terms of the agreement, the Seminary retained a small portion of the Blanski property, which abutted the Seminary's Jones Lake parcel but stood outside of the wetland, for possible use at some future date in the event the Seminary ever were to need upland space for constructing another tower within Jones Lake itself.

53. After construction was completed in 1964, the tower was operated lawfully for 16 years without objection from any governmental body.

54. On one occasion in the 1970s, occupants of nearby apartments complained that the tower's signal was interfering with their television reception. The problem was traced to WAYL's signals and corrected promptly by Contemporary. There were no further complaints or

problems with the tower or its signals during the life of the tower. The Seminary never received any objections, either from regulatory bodies or persons not affiliated with any governmental agency, regarding its WCTS operations on the Jones Lake tower.

55. The Seminary never used the Jones Lake or Blanski properties for any purpose other than radio tower operations.

CHARACTER OF JONES LAKE

56. At the time the Seminary acquired title to the Jones Lake property in 1963, the property was zoned by New Brighton for industrial use. A radio tower was a permitted use under this zoning classification.

57. The former owners of the Jones Lake property, the Goldemans, used the property for a pig farm prior to the acquisition of the land in 1962 by Wallace and Dorothy Ann Anderson.

58. In the 1950s, the City began to use Jones Lake for flood and stormwater storage.

59. The water level of Jones Lake has fluctuated significantly over the years. Aerial photographs show that in 1940 Jones Lake was dry, that in 1985 it held some water with interspersed aquatic vegetation, and that in 1963 and 1950 it held more water than 1985, but the open water was surrounded by cattails and other aquatic vegetation.

60. When Wallace Anderson first located the Jones Lake property in 1960, the area was a meadow without substantial water. Anderson testified, however, that by 1963 the water level was as high as he ever observed. DNR records show that the wetland's measured water level in 1963 was approximately six feet, the highest recorded level.

61. Sometime during the period 1968 to 1970, the City lowered the outlet to Jones Lake to increase the

basin's water storage capacity. As a result of the City's action, the water level of Jones Lake was lowered from approximately 4 - 1/2 feet to 1 to 2 - 1/2 feet.

62. In 1976, Jones Lake was completely dry according to DNR records.

63. In a 1978 survey, DNR reported that the maximum depth of Jones Lake in 1978 was 1.1 feet, the average depth was 0.8 feet, and 90 percent of the wetland had a depth of less than 1 foot.

64. The most recent DNR survey, conducted in December 1981, showed that Jones Lake at that time was approximately 2-1/2 feet deep with a run out elevation of 891.6 feet, which means that in dry times the water level can be as shallow as 1.2 feet or less.

65. There has never been any designated public access to Jones Lake.

66. In June 1962, DNR investigated Jones Lake for its suitability for fish stocking and management. According to DNR records, at that time Jones Lake had a maximum depth of 4 feet and an average water level of 2 1/2 feet, and the open water was surrounded by a dense cattail mat. The DNR biologist who made the investigation concluded in his 1962 report that Jones Lake's "propensity for winterkill removes it from consideration as a fish lake," and recommended that no DNR management measures be attempted at the wetland. This recommendation was repeated in a DNR report in June 1963.

67. In the report accompanying its 1978 survey, DNR staff recommended that Jones Lake was of "little or no value for fisheries management purposes." In a report dated April 1980, DNR concluded that Jones Lake "is of no fisheries value."

68. The only uses to which the Jones Lake has been put from 1960 to the present are for open space, groundwater recharge, stormwater and runoff collection, nutrient entrapment, and wildlife habitat. These uses

generally are inherent in wetlands, and are not unique to Jones Lake. The only other use of Jones Lake for any significant period of time was as a radio tower site from 1964 until August 7, 1980. Ronald Peterson, an expert witness for the Seminary, testified that in the mid-1970s he briefly trapped muskrats one summer at Jones Lake without the knowledge or permission of the Seminary. Peterson made only a handful of trips to Jones Lake for this purpose, and his trapping was largely unsuccessful. There is no evidence of any other trapping at Jones Lake or any other use besides that described in this paragraph.

69. Jones Lake has not been used for any drinking water purposes or for private or public recreational purposes such as fishing, boating, swimming or hunting at any time from the date that the Andersons acquired the property for the Seminary in 1962 through the present. There was no evidence that Jones Lake had any drinking water uses or recreational uses for activities such as fishing, boating, swimming or hunting prior to 1962.

70. The physical characteristics of Jones Lake prior to 1973 (including the fluctuating water levels, generally shallow water and presence of aquatic vegetation) all demonstrate that Jones Lake has been a wetland, rather than a lake at all times relevant to this matter.

71. DNR records show that on three separate occasions in September and October 1964, the Department received telephone calls reporting filling occurring in Jones Lake. During the last call on October 13,1964, it was reported that a party "has poured footings for a radio aerial," along with other filling in Jones Lake. There are no records documenting, and DNR conceded it had no evidence indicating, that the Department ever followed up on this information to object to the radio tower or to take any other action with respect to the reported tower or other filling in Jones Lake.

72. The DNR was aware by no later than October 13, 1964 that a radio tower was being built within Jones Lake,

but the Department made no objection to the Seminary or another party regarding the tower construction.

73. At the time the Seminary acquired title to the Jones Lake property and for some time thereafter, the owners of abutting land directly to the north of the Jones Lake property were placing large amounts of fill within the wetland boundaries. DNR records indicate that the Department was advised on several occasions in the 1960s of filling in Jones Lake but DNR neither ordered the fill removed nor issued any other type of order or permit with respect to the filling. Aerial photographs demonstrate substantial amounts of fill remain within the wetland into the 1980s.

74. DNR records show that in 1970, the Department again became aware of additional filling being done on the northern edge of Jones Lake. These records show that the City objected to the filling, and DNR wrote some letters to support the City's actions. There is no evidence, however, that DNR ordered the fill removed or issued any other type of order or permit with respect to the filling. Aerial photographs demonstrate that much, if not all, of the fill was still present in Jones Lake in the 1980s.

75. DNR learned that the City had lowered the level of Jones Lake, described in finding 61, either before or shortly after the modification occurred.

76. DNR did not object to or otherwise attempt to rectify or reverse the action of the City in draining Jones Lake or to require New Brighton to obtain a permit (either before or after the City's action) when the level of Jones Lake was lowered.

77. Prior to 1973, a wetland or other body of water was subject to DNR regulation only if it was a "public water" within the meaning of Minn. Stat. Chap. 105. To be a "public water," the then-applicable statute required that a water body serve a "substantial beneficial public use."

78. Jones Lake never served a substantial beneficial public use within the meaning of the laws in effect prior to 1973. Thus, Jones Lake was not a public water within the meaning of Minn. Stat. Chap. 105 when the Seminary acquired the wetland in 1963 and built the radio tower in 1964.

79. A review of DNR records concerning Jones Lake prior to 1973 does not indicate that the Department considered the wetland to be a public water under then applicable Minnesota law. The mere presence of records in DNR files concerning Jones Lake prior to 1973 does not establish that DNR had (or believed it had) jurisdiction over the water body because DNR collects such information for a wide variety of purposes. DNR did not claim jurisdiction over Jones Lake until its formal designation as a wetland in 1982.

80. DNR's actions also demonstrate that it did not consider Jones Lake to be a public water prior to 1973 within the meaning of the then-current law. DNR effectively acquiesced in the construction of the Seminary's radio tower in 1964, the lowering of the water level of Jones Lake in about 1970, and the adding of substantial amounts of fill to the northern boundary of Jones Lake on several occasions in the 1960s and early 1970s. DNR knew of these activities (which were incompatible with public water status under the then applicable statute) either before or shortly after they occurred. If Jones Lake were a public water prior to 1973, DNR would have had authority to prevent or require the undoing of these activities. The agency took no such regulatory action.

81. The testimony of the DNR hydrologist that Jones Lake was a public water prior to 1973 because it served a substantial beneficial public use at the time the Seminary acquired the property is not persuasive on this point. The hydrologist conceded that she was first employed by DNR in the late 1970s, that she had no personal knowledge of

any views the Department may have had or actions it may or may not have taken with respect to Jones Lake prior to her employment by DNR, and that she was not familiar with the laws and rules regarding public waters in effect prior to 1973 or how those laws and rules were applied.

THE TOWER'S DESTRUCTION AND PLANS FOR REBUILDING

82. On August 7, 1980, the tower at Jones Lake from which the Seminary was broadcasting was felled in a violent windstorm and struck an adjacent apartment building.

83. At the request of the Seminary, the company that had purchased Contemporary, Entertainment Communications ("Entercom"), filed on September 5, 1980 an application for a building permit with the City to reconstruct the tower at its original location straddling the Blanski and Jones Lake properties.

84. At the time of the tower's collapse in 1980, Section 10-140a of the City's zoning ordinance created a 40-foot height limitation for industrial districts, which included both the Blanski and Jones Lake properties. The 40-foot height limitation did not apply to a radio tower unless in the opinion of the building inspector, such a tower might be dangerous or in other ways detrimental to surrounding property, in which case a special use permit was required. The City zoning ordinances contained no specific tower setback requirements at the time.

85. On September 10, 1980, the City building inspector denied the application of Entercom to reconstruct the radio tower, stating that in his opinion the tower might be dangerous or otherwise detrimental to surrounding property.

86. The September 10, 1980 permit denial by the City building inspector required Entercom to obtain a special

use permit from the Planning Commission and the full City Council after a public hearing if Entercom were to proceed with the project.

87. After receiving the City building inspector's denial, Entercom informed the Seminary that Entercom would not make application to the City for a special use permit due to the improbability of securing the that permit.

88. After the tower fell, the City received numerous telephone calls and complaints regarding the reconstruction of the tower from the residents of the nearby apartment building and the building owner.

89. On June 9, 1981, the City amended its zoning ordinance to require that all structures over 40 feet, without exceptions for radio towers, obtain a special use permit. The amended ordinances required guyed radio towers to have setbacks equal to or greater than 75 percent of the height of the tower.

90. The City's zoning ordinances, as amended in 1981, eliminated the Blanski property as a potential site for the reconstruction of the Seminary's radio tower.

91. Given the public opposition to the reconstruction of the tower at its original location, neither Entercom nor the Seminary could have obtained either a special use permit under the pre-1981 code or a variance under the 1981 amended code for a plan to reconstruct the tower at the site straddling the Blanski and Jones Lake parcels. Thus, application for such a special use permit or variance would have been futile.

92. The elimination of the original site for reconstruction of the radio tower led Entercom to terminate its radio tower sharing arrangement with the Seminary in 1981. As a result, the Seminary's 99-year lease with WAYL was no longer able to be performed.

THE SEARCH FOR A REPLACEMENT TOWER

93. After the original tower was blown over on August 3, 1980, the Jones Lake property was the only site available to the Seminary for the reconstruction of its radio tower. The Seminary owned no other land suitable for the tower, and it had no access to an existing tower.

94. As a result of the tower destruction in August 1980, the Seminary was required to establish a 175-foot temporary replacement antenna from the roof of its building in north Minneapolis that broadcast at 50,000 watts. This temporary arrangement was extremely unsatisfactory because the broadcast signal was significantly less than the 80,000 watts authorized at that time by the Seminary's FCC license. Furthermore, the effective range of reception of WCTS was reduced from a radius of 60 miles to about 25 miles.

95. The Seminary's replacement arrangement was subject to a FCC special temporary authorization permit that had to be renewed every six months under applicable federal regulations. This permit was renewed periodically as required by the FCC until the Seminary made arrangements in 1986 to rent space on another tower.

96. After the City denied the application to reconstruct the WCTS-WAYL tower at its former location and Entercom terminated the tower sharing agreement, the Seminary began planning a replacement tower for its Jones Lake property. The Seminary initiated engineering and construction feasibility studies by Braun Engineering, McCombs-Knutson, TriState Drilling, UNR-Rohn and US Tower. The reports by these firms indicated that the new tower could only be located in the middle of Jones Lake because of the City's amended setback requirements, and that construction at this location was feasible from an engineering (including both structural and broadcast) standpoint.

97. The Seminary was informed by its engineering consultants that the work to construct the tower in Jones Lake would have minimal environmental effects, and that once constructed, the tower would not damage the wetland itself (including water, soils and vegetation) or have other significant adverse environmental effects. The Seminary also was informed that the tower would not affect the stormwater and runoff collection uses of the wetland by the City and Rice Creek Watershed District.

98. The Seminary's trustees determined that reconstruction of the tower in Jones Lake was feasible from engineering and financial standpoints and approved the project.

99. The Seminary planned to finish reconstruction of the tower in Jones Lake and be back on the air in 1983.

100. All necessary state and federal regulatory approvals of the tower construction were obtained by the Seminary, with the exception of the DNR. The DNR permit was the only regulatory obstacle that prevented the Seminary from reconstructing the radio tower.

101. On September 29, 1983, the FAA approved the Seminary's plans to construct the radio tower on its Jones Lake property.

102. On February 18, 1983, the FCC granted the Seminary a permit to construct its planned tower on the Jones Lake property.

103. On November 3, 1982, the Rice Creek Watershed District granted the Seminary a permit to construct its radio tower on the Jones Lake property. This approval was conditioned upon the Seminary granting the Watershed District a ponding and flowage easement over the entire Jones Lake property below the elevation of 896.5 feet, the 100 year high water level for Jones Lake, in order to further the Watershed District's efforts to control stormwater runoff and flooding. The Seminary agreed to this condition.

104. On December 8, 1982, the United States Army Corps. of Engineers granted the Seminary approval to construct the radio tower on the Jones Lake property.

105. On January 25, 1983, the City of New Brighton granted the Seminary a special use permit to construct the radio tower on the Jones Lake property.

106. On November 22, 1982, the Seminary applied to the DNR for a permit to reconstruct the radio tower on the Jones Lake property.

107. When DNR officials expressed some concerns about the project, Seminary representatives met with Department staff. The Seminary developed modifications, based on the advice of its experts, to address the concerns of DNR. These modifications included removing the walkway to the tower to eliminate permanent fill in the wetland and placing markers on the tower and its guy wires to reduce risks of avian mortality. The Seminary's experts indicated that while there was some possibility of avian mortality from the tower, the overall impact on birds would be only nominal. The Seminary's experts indicated there would be no adverse impact on other wildlife or their habitat at Jones Lake.

108. In an order dated January 31, 1983, the DNR Commissioner denied the Seminary's permit application on the ground that it apparently had become the policy of the DNR to discourage the waterward occupation of the beds of protected waters by structures. The order also indicated that it was now DNR's policy to generally deny applications for construction of radio towers in protected wetlands to avoid creating precedents for such projects in the future.

109. Upon receipt of the DNR Commissioner's permit denial, the Seminary requested a hearing on its permit application. After a three-day administrative hearing in March 1984, the administrative law judge recommended that the permit be denied.

110. In an order dated January 7, 1985, the DNR Commissioner adopted the findings of the administrative law judge and issued an order denying the Seminary's permit application.

111. Neither the 1983 nor the 1985 permit denials by DNR report any encroachment or interference with the rights of other owners of riparian property abutting Jones Lake. The permit denials evidence no likelihood that the Seminary's plans would have interfered with the use or enjoyment of any nearby property.

112. The tower planned by the Seminary would have been safe and unobtrustive in terms of its impacts on public health and welfare. In terms of public safety, location of the tower near the middle of Jones Lake was superior to the original tower's location near the apartment buildings adjacent to the wetland. The planned replacement tower would not have interfered with the television or radio reception of nearby residents.

113. DNR has permitted radio towers to be constructed in protected wetlands other than Jones Lake in the Twin Cities area.

114. The Seminary's plans to build a radio tower on the Jones Lake property would not have interfered with the rights or uses of other riparian property owners, or with the use and enjoyment of any nearby properties by their owners.

115. The primary reasons for DNR's permit denial were (1) to further its statewide policy against permitting manmade structures in wetlands, (2) to discourage construction of other towers in wetlands, and (3) to prevent avian mortality. These are public and governmental benefits and purposes that further the statewide policies of the DNR.

116. The Seminary received no benefit whatsoever from the DNR's permit denial.

117. Neighboring landowners adjacent to Jones Lake receive a significant benefit by virtue of DNR's permit

denial. The neighboring landowners have benefitted by maintenance of the Jones Lake property in its natural and undeveloped state.

118. Neighboring landowners will continue to benefit from DNR's regulatory action because they are assured of the continued natural and undeveloped state of the Jones Lake property as long as DNR's current wetland regulations remain in place.

IMPACTS OF DNR'S PERMIT DENIAL

119. As a result of the Seminary's concerns over the continued willingness of the FCC to renew the special temporary authorization and its inability to obtain permission from DNR to rebuild the tower in Jones Lake or to locate any other tower space, the Seminary in 1986 made arrangements with KTWN, Inc. to rent space on its then newly-constructed tower in Nowthen in northern Anoka County, Minnesota.

120. Before making arrangements with KTWN for space on its new tower in Nowthen in 1986, the Seminary unsuccessfully sought to locate property to build a new tower or to rent space on an existing tower in 29 communities in the Twin Cities metropolitan area.

121. The Seminary's lease arrangements at the Anoka County tower, which allow the Seminary to broadcast at its full FCC-authorized power, expire in 2025.

122. Over the term of its 41-year lease with KTWN (assuming the two option terms are exercised) the Seminary will pay rental fees totalling more than $3.5 million. In contrast, the Seminary would have paid nothing for space on the tower it planned to construct in Jones Lake, as was the case with the no-rent, 99-year lease which it previously held with WAYL that was not scheduled to expire until 2063.

123. The Seminary's broadcast coverage would have been superior at the planned Jones Lake tower to that

available on the Anoka County tower. The Seminary's broadcast from the Anoka County tower presently does not adequately cover much of the metropolitan area of potential listeners. The Seminary's broadcast signal from the Jones Lake tower would have been available to 1.8 million people, while it is available to only 1.4 million people from the Anoka County tower.

124. The Seminary intended to rent antenna space on its Jones Lake tower to other FM radio stations and to two-way communications operators. Before the DNR permit problems arose, the Seminary was engaged in negotiations with WLTE-FM, KTIS-FM, and other FM stations for space on the Jones Lake tower. The Seminary also had received inquiries from potential sideban (two-way communication) users during the planning phase for the new Jones Lake tower.

125. Radio tower space in the Twin Cities during the 1980s was very limited, and as a result, land available for tower space was valued at a significant premium. These market conditions generally continue at the present.

126. No new FM radio towers were constructed in the 1980s in Minneapolis-St. Paul, the inner ring of suburbs, or the outer (or developing) ring of suburbs. The only new FM towers constructed to serve the metropolitan area in the 1980s were in the far outlying areas of Anoka County, Washington County, Dakota County and Somerset, Wisconsin. The only other new FM space resulted from the reconfiguration of an existing tower in Shoreview, where the main antenna complex serving the metropolitan area is located.

127. The Seminary's planned Jones Lake tower could have been multiplexed to hold at least three FM antennae and seven two-way communications antennae. The evidence was undisputed that from an engineering standpoint, additional FM and two-way antennae could have been constructed on the Seminary's tower, but the Seminary's appraiser based his valuation on three FM

and seven two-way antennae to use a conservative valuation approach.

128. From location, engineering and market perspectives, the Seminary's planned tower can be built at Jones Lake.

129. The parties agreed that the Seminary's property had a fair market value of $725,000 as a radio tower site. This value was based on the calculations of the Seminary's appraiser, who used both development cost and comparable sales approaches in reaching his valuation. These valuation methods were reasonable, and this Court finds that the value of the Seminary's property was $725,000 as a radio tower site.

THERE ARE NO SUBSTANTIAL USES OF THE JONES LAKE PROPERTY

130. A major constraint on the Seminary's use of the Jones Lake property is that the parcel is landlocked. The property does not have frontage on a public roadway and is completely surrounded by private lots. There is also no access to the Jones Lake property for water, sewer or any utility service.

131. The only access to the Seminary's property is over the 10-foot easement the Seminary retained when it sold the Blanski property to Contemporary and another easement obtained from the Goldemans when the Jones Lake property was initially acquired. Both easements are limited, however, to use only in connection with operation of a radio tower.

132. The Seminary did not abandon its easement across the Blanski parcel when the former radio tower was felled by the windstorm in 1980. The Seminary has at all times continued to believe, and publicly state, that the Blanski easement provides it with access to the Jones Lake property for radio tower purposes, including access to a replacement tower for the one blown over in 1980. Based

on this understanding, the Seminary planned to construct a replacement radio tower in Jones Lake, incurred substantial costs in that planning effort, and filed applications for governmental approval of the replacement tower. Contemporary was aware of the Seminary's plan to construct the radio tower, and Contemporary did not object to that plan. DNR's contention that the Seminary abandoned its Blanski easement is based on unsubstantiated speculation, and based on the record such contention is not founded.

133. No development or economic use is feasible on the Seminary's property because of the lack of access for transportation or for water, sewer or other utility service. Even if access were available to the Seminary's property, no development or economic use of the property is feasible because of DNR's wetland restrictions applicable to Jones Lake. The only exception is that the site could be used for the radio tower planned by the Seminary and for which the Seminary has access under its tower easements. DNR, however, has prohibited this radio tower use.

134. Current regulations promulgated by the DNR (Minn. Rule 6115.0190 subp. 3(B)) absolutely prohibit the draining or filling of wetlands to create upland

135. Current Minnesota law provides that any work that will alter the course, current or cross-section of a protected wetland cannot be performed unless a permit is obtained from the DNR pursuant to the requirements contained in Minn. Stat. § 103G.245 (formerly § 105.42) and Minn. Rules Chapter 6115.

136. Minn. Rule 6115.0210 states that it is DNR policy to discourage manmade structures in wetlands. DNR enforces this policy through permit denial. Because DNR enforces these regulations very strictly, a permit for any sort of construction or development project in a wetland is practically impossible to obtain unless the project is public or the encroachment is very minor.

137. As a result of DNR regulations, the Seminary is prohibited from draining, filling or altering the course, current or cross-section of Jones Lake, which was designated as a protected wetland in 1982.

138. There is no likelihood that the Seminary could obtain a variance or permit from DNR to allow any construction whatsoever within the Jones Lake wetland. DNR already has denied the Seminary's request to construct the planned radio tower, and that project would have entailed a minimum amount of fill and excavation. There is no potential use of Jones Lake that would have less impact on the wetland itself, in terms of fill and/or excavation, than the tower project rejected by DNR.

139. The DNR regulations remove from consideration any reasonably anticipated development or viable economic use of that portion of the Seminary's property within the Jones Lake wetland boundary, which includes all the area below the 895.2 feet ordinary high water mark, even if access were available.

140. The area of the property within DNR's wetland boundary amounts to approximately 97 percent of the total 24.6 acre site, leaving a narrow strip on the western edge of the property that totals approximately 1/2 acre free from DNR's wetland restrictions.

141. Due to its very limited size (a total of about 1/2 acre of non-contiguous pieces), no reasonably-anticipated development or economically viable use can be made of those parts the Seminary's property that are outside of the wetland boundary even if access to the Seminary's property were available.

142. The Seminary could not feasibly use its Property for storing balled trees or as an apiary. These are not reasonable or viable economic uses. The Seminary has no access to its property for such uses. Even if access were available, to the extent that such uses were to be carried out within the wetland boundary, they would be incompatible with the physical characteristics of the

property and would be impermissible under DNR's wetland rules. There is insufficient space for such activities outside of the wetland boundary.

143. No party has approached, or is presently contemplating approaching, the Seminary regarding the use or acquisition of the Jones Lake property for storing balled trees, raising bees or other nursery or agricultural uses.

144. The only evidence of nursery activities or balled trees storage cited by DNR involved a property in Shakopee which included both upland and wetland portions. The evidence indicated that the nursery storage activities occurred in the upland portion of the property, not within the wetland itself.

145. DNR suggested that the Seminary's property may be purchased by another party who might wish to add the property to adjoining parcels. One rationale offered by DNR for such an acquisition would be to acquire the Seminary's property for the aesthetic value of viewing Jones Lake. DNR's other theory is that the Seminary's property may be purchased by a party interested in acquiring it for density credit. These alleged cases are not reasonable or economically viable economic uses of the Seminary's property.

146. It is highly unlikely any present or future owners of land adjacent to Jones Lake would be interested in buying the Jones Lake property for its aesthetic value because they can receive the benefit of its open space and natural qualities without acquiring the Seminary's property as long as the wetland remains undeveloped, and the land in all likelihood will remain in its natural state because of DNR regulations.

147. Only legally buildable land, which excludes wetland property, may be used in calculating compliance with the City's density restrictions. Although it might be theoretically possible to transfer property for density

credit, this is not a common practice in New Brighton, and is therefore not likely to occur.

148. By reason of the fact that only approximately 1/2 acre of the Seminary's property lies outside of the designated wetland, only this 1/2 acre would be available for density credit if the Seminary's property were to be combined with an adjacent property.

149. There are many acres of undeveloped space immediately adjacent to Jones Lake, and this further reduces the need for or possibility of acquisition of the Seminary's land for density-credit transfer.

150. It is very unlikely that any private developer would acquire the Seminary's property for aesthetic or density-credit transfer or other purposes.

151. The City has no intention of or plans for acquiring the Seminary's property for park land, open space or other passive recreational use. DNR's appraiser testified that it would be improper in evaluating the use and value of the Seminary's property, to consider potential governmental uses of the property. This Court agrees with and adopts that opinion of DNR's appraiser.

152. The Seminary has received no offers to buy, or even expressions of interest in buying, its property for any reason. The purchase of the Jones Lake property by any person for any reason is extremely unlikely because its use is completely restricted by DNR regulations, and the non-wetland part of the property is very limited.

MONETARY ISSUES

153. The Jones Lake property represents an ideal location for a radio tower in terms of location in the Twin Cities and elevation.

154. Use of the Jones Lake property as a radio tower site would constitute the greatest return and financial benefit to the Seminary.

155. The fair market value on October 11, 1985 of the Jones Lake property as a radio tower site is $725,000.

156. The fair market value of the Seminary's property without a radio tower is $10,000 or less, which is its nominal donation value.

157. DNR's appraisal expert valued the Seminary's property at $24,000 based upon comparisons of the Seminary's land with four real estate sales in the Twin Cities. This valuation is not adopted by this Court. In each of the four instances cited by DNR, the so-called comparable properties included both upland property available for development as well as wetland property. Since these properties were not limited to wetland property only, as is the case with the Seminary's land, they in fact are not truly comparable to the Jones Lake property. This is particularly true of the sale identified as comparable number 2, on which DNR's appraiser placed special emphasis. This comparable number 2 had both upland and wetland property. In addition, the property in comparable number 2 was acquired by the buyer for the specific purpose of creating a buffer zone for a trailer park. There has been no similar need identified for the Seminary's land. Finally, the wetland on comparable number 2 is not a DNR-protected wetland, and thus, unlike the Seminary's land, is potentially available for development.

158. In valuing the Seminary's property through a comparable sales approach, DNR's appraiser failed to address the essential point of why any person would be motivated to buy the Seminary's property. The uses suggested by DNR as motivations for buying the Seminary's property are specifically rejected as speculative and unsupported by credible evidence for the reasons stated above.

159. The DNR's appraiser testified that he did not value the Seminary's property as a radio tower site because he could find no comparable sales. He admitted

that if he had been aware of comparable sales, it would have been appropriate to value the Seminary's property as a radio tower site. Plaintiffs appraisal expert testified with respect to two comparable sales of radio tower sites in the Twin Cities in recent months. The DNR's appraiser conceded that this information would have affected his evaluation if he had known of it.

160. The DNR appraiser attempted to compensate in his analysis for the supposed value of the ponding easement held by the City on the Seminary's property. He did not, however, provide any explanation as to how the ponding easement prevents any development that would have been allowed by the DNR. The DNR appraiser also conceded that the dollar value he assigned for the value of ponding was speculative.

161. The valuation placed on the Seminary's property by DNR cannot be accepted because it is not based on credible evidence that is reasonably relevant to the Jones Lake property in light of the physical characteristics and regulatory restraints applicable to the property.

162. The Seminary's expenses incurred in moving its radio tower from New Brighton to Anoka County were as follows:

Moving and Related Expenses	
Data World - search for new tower space	$ 150.00
KTIS - consulting engineer for tower application	1,038.00
Roger's Company - fund raising expenses	15,480.00
Q Carriers - transported tower equipment	1,982.00
Williams Electric - provided switching for tower	9,228.33
R. F. Cooling - transmitter expenses	195.27

Tower Systems/KTWN - mounted new antenna	9,597.84	
Thunderbird Aviation - transportation to factory	317.00	
Harris Corporation - new equipment	36,250.00	
Schnader, Harrison, et al. - legal fees associated with application, etc. (Wash. D.C.)	17,964.29	
SUBTOTAL		$ 92,202.73
Search Expenses		
D. L. Markley - consultant for new tower		1,000.00
Reestablishment Expenses		
Monthly Lease Payments (first 24 months)	58,500.00	
Additional Payments (first 24 months)	435,000.00	
SUBTOTAL		493,500.00
TOTAL		$586,702.73

CONCLUSIONS OF LAW

1. Jones Lake was not a "public water" pursuant to Minn. Stat. Chap. 105 when the Seminary acquired title to the property in 1963.

2. The earliest the DNR had regulatory authority over Jones Lake was 1973, when Minn. Stat. Chap. 105 was amended to expand DNR's authority over certain bodies of water.

3. The legal conclusions of the administrative law judge (ALJ) and the DNR Commissioner in the administrative proceedings involving the Seminary's

permit application that Jones Lake was a "public water" pursuant to Minn. Stat. Chap. 105 when the Seminary acquired title in 1963 and built the radio tower in 1964 are neither persuasive nor binding on this Court. The conclusions of the ALJ and the DNR Commissioner are inconsistent with the law as established by the Minnesota Supreme Court, and they do not control this Court's resolution of that issue as a matter of law. The doctrines of collateral estoppel and law of the case are inapplicable to this proceeding with respect to the issue of Jones Lake's public water status, and this Court is entitled to make a de novo determination of this public water issue.

4. The Seminary had a property right to construct the radio tower on the Jones Lake property, subject to regulatory approval, both when it built the original radio tower and when it sought permission to build the replacement tower. Defendants' contrary theory is not supported by law or fact.

5. The water in Jones Lake is, and always has been, owned by the State of Minnesota, not the Seminary. Nonetheless, the Seminary, as the owner of the land underlying Jones Lake, has (and has had at all times relevant to this proceeding) a property right to build a radio tower on its property as long as that tower did not interfere with the riparian rights of other parties owning land adjacent to Jones Lake. The Seminary's original tower did not interfere, and its planned replacement would not have interfered, with any such riparian rights.

6. Defendants cannot defeat the Seminary's taking claims on the ground that the proposed tower to be constructed in Jones Lake constituted a nuisance or otherwise threatened public health and welfare.

7. A radio tower on the Jones Lake property would not have interfered with the rights, riparian or otherwise, of the neighboring property owners. The radio tower would not have constituted a nuisance or otherwise have been injurious to neighboring property owners.

8. The basis for DNR's denial of the Seminary's application to rebuild its tower was not that the project constituted a nuisance; instead, DNR denied the permit to foster its policy of preserving wetlands and to secure other public benefits. DNR has agreed that it rejected the Seminary's permit application to advance such public purposes and secure such public benefits.

9. There is no basis in law or fact for DNR's allegation that the Seminary has no valid claims on the theory that the Seminary lacked access to its property for radio tower purposes.

10. Only the Seminary's Jones Lake property is to be considered in determining whether the Seminary claims are valid. It would be inappropriate to consider the Blanski property in evaluating the Seminary's claims because plaintiff did not own the Blanski parcel when DNR denied the Seminary's application to construct a replacement radio tower on the Jones Lake property.

11. To prevail on its taking claims, the Seminary need not show that it intended to construct the replacement tower prohibited by DNR in the same location as the former tower straddling the Jones Lake and Blanski properties.

12. This Court has considered the fact that the Seminary paid nothing for its Jones Lake property, but that fact is not dispositive with respect to the Seminary's claims.

13. For purposes of determining the Seminary's taking claims, the value of the Seminary's property at the time of DNR's permit denial and as a site for a proposed radio tower must be considered by this Court.

14. The highest and best use of the Jones Lake property is as a radio tower site.

15. DNR's permit denial constituted an unconstitutional taking of the Seminary's property under the reasonable use test. The following, along with the

foregoing factual findings and legal conclusions, are relevant to this conclusion:

(a) There is no reasonably beneficial or economically feasible use to which the Seminary can put its Jones Lake property in light of applicable DNR regulations.

(b) The Seminary has been denied all substantial and reasonable use of its property solely by virtue of the DNR's permit denial.

(c) There were absolutely no indications prior to the time the Seminary filed its permit application with DNR that would have caused the Seminary to believe that it would have been prevented from constructing the radio tower on its Jones Lake property by DNR regulation.

(d) The Seminary reasonably expected to be able to use its property for a radio tower site when it acquired title in 1962 and at all times thereafter until its permit was denied by DNR.

(e) The Seminary's reasonable investment-backed expectations have been destroyed by the DNR's denial of the Seminary's application to construct a radio tower on the Jones Lake property.

(f) The value of the Jones Lake property has been substantially destroyed by the DNR's permit denial. As a sole result of DNR's regulatory action, the market value of the Seminary's land has been reduced from $725,000 as a radio tower site to $10,000 or less for its nominal donation value.

(g) The Seminary, as compared to the public at large, has been uniquely burdened by DNR's furtherance of its wetlands policy in denying the permit application of the Seminary.

(h) DNR has extracted public benefits from the Seminary in furtherance of its wetlands policy

without payment or compensation to the Seminary.

(i) The Seminary has received no benefit whatsoever from the DNR's permit denial.

16. Separate and apart from conclusion number 15, DNR has affected an unconstitutional taking of the Seminary's property under the benefit-extraction (or Alevizos) test. The following, along with the foregoing factual findings and legal conclusions, are relevant to this conclusion:

(a) DNR's permit denial was designed in prominent part to serve a governmental enterprise function.

(b) The permit denial was designed to secure public benefits such as wildlife protection, stormwater collection, flood control, erosion control and open space preservation. Such public benefits were secured by forcing the Seminary alone to bear the burden of making its land available, without compensation, for public use.

(c) The Seminary, as compared to the general public, was uniquely burdened by DNR's wetland policies which were furthered by the denial of the Seminary's permit application.

(d) DNR has extracted public benefits from the Seminary in furtherance of its public policies without payment or compensation to the Seminary.

(e) The Seminary received no benefit whatsoever as a result of DNR's permit denial.

(f) The DNR was solely responsible for the Seminary's inability to construct its planned radio tower in Jones Lake by denying the Seminary's permit application.

(g) DNR's permit denial restricted the Seminary's use and enjoyment of its property.

(h) DNR's permit denial resulted in a definite and measurable decline in the value of the

Seminary's property. DNR stipulated that the Seminary's property was substantially and measurably more valuable with a radio tower than without one.

(i) The decline in the value of the Seminary's property is demonstrated by its worth of $725,000 as a radio tower site and of $10,000 or less for its nominal donation value without a tower.

17. DNR has unconstitutionally taken the Seminary's property without just compensation in violation of Article I, Sections VII and XIII of the Minnesota Constitution, and the Fifth and Fourteenth Amendments to the United Stales Constitution.

18. DNR must pay just compensation to the Seminary for the property unconstitutionally taken by the Department. To provide such compensation, DNR must commence condemnation proceedings against the Seminary's Jones Lake property within 60 days of this order in accordance with the requirements of Minn. Stat. Chap. 117.

19. In determining the compensation to which the Seminary is entitled in the compensation proceeding, valuation of the Jones Lake property as a radio tower site shall be appropriate and shall not be precluded on the basis that a radio tower may not be lawfully built on the property.

20. The Seminary is entitled to reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, included in bringing this inverse condemnation action pursuant to Minn. Stat. § 117.045. The Seminary should file a separate motion for this amount within 60 days of the entry of this order.

21. The Seminary is entitled to relocation expenses pursuant to Minn. Stat. § 117.52 totalling $103,202.73. The Seminary is entitled to reimbursement of $92,202.73 incurred as a result of moving and related expenses, $1,000.00 incurred as a result of search expenses and

$10,000.00 incurred as a result of reestablishment expenses. These expenses are reimbursable under the rules set forth in 49 C.F.R. § 24.303(a), which are incorporated by reference in Minn. Stat. § 117.52.

22. The Seminary is entitled to interest on all monetary awards granted in this order in an amount to be determined by this Court beginning from October 11, 1985, the date the Court of Appeals upheld DNR's permit denial, through the date DNR pays the damages awarded hereunder.

ORDER OF JUDGMENT

It is hereby ordered that judgment be entered in favor of Plaintiff Central Baptist Theological Seminary in accordance with the above findings of fact and conclusions of law.

Let Judgment be entered accordingly.

DATED: 5/8, 1991

BY THE COURT:

/s/ Allan R. Markert
District Court Judge

EXHIBIT C

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CONDEMNATION
COURT FILE NO. C487489344

Central Baptist Theological Seminary,

Plaintiff,

vs.

City of New Brighton, State of Minnesota, Department of Natural Resources; and Joseph N. Alexander, individually and as Commissioner of Department of Natural Resources,

Defendants.

ORDER MODIFYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF JUDGMENT

This matter was tried to this Court on March 19 through 22, 1991. On May 8, 1991, this Court executed Findings of Fact, Conclusions of Law and Order of Judgement (the "May 8 Order"). This Order modifies the May 8 Order as set forth below, and is based on all testimony and exhibits received into the record, the various memoranda and arguments submitted by counsel, and all other proceedings herein.

It is hereby ordered as follows:

A. All Findings of Fact and Conclusions of Law of the May 8 Order not explicitly modified pursuant to this Order remain unchanged and in full force and effect.

B. Paragraph 22 of the Conclusions of Law is replaced in its entirety with the following paragraph 22 and an additional paragraph 23 is added:

22. The Seminary is entitled to interest on all monetary awards granted in this Order pursuant to Minn. Stat. § 117.195, subd. 1. The interest on the compensation awarded pursuant to paragraph 18 of the Conclusions of Law and the relocation expenses awarded pursuant to paragraph 21 of the Conclusions of Law shall be awarded for the period from October 11, 1985, the date the Court of Appeals upheld DNR's permit denial, through the date DNR that pays the damages awarded pursuant to said paragraphs. With respect to interest on compensation paid pursuant to paragraph 18 above, the amount of interest shall be calculated at the time compensation is paid by DNR. With respect to the relocation expenses awarded pursuant to paragraph 21 above, the interest as of May 1991, totals $44,843.64. Further interest shall be accrued on those relocation expenses pursuant to Minn. Stat. § 117.195, subd. 1 from May 8, 1991 until the date such expenses are paid by DNR.

23. The interest owed under paragraph 22 of the Conclusions of Law shall be calculated as follows: 9 percent per annum from October 11, 1985 until December 31, 1985; 8 percent per annum for the years 1986 through 1989, inclusive; 7 percent per annum for 1990; and 7 percent per annum from January 1, 1991 until December 31, 1991 or until the date such expenses are paid, whichever date is earliest, and if unpaid prior to January 1, 1992, the rate of interest allowed under Minn. Stat. § 117.195, subd. 1 from January 1, 1992 until the date such payments are made.

C. The Order of Judgment on page 32 of the May 8 Order is replaced, in its entirety, with the following:

ORDER OF JUDGMENT

It is hereby ordered that judgment be entered in favor of Plaintiff Central Baptist Theological Seminary in accordance with the Findings of Fact, Conclusions of Law and Order of Judgment, dated May 8, 1991, as modified by this Order. Such judgment shall include relocation expenses in the amount of $103,202.73 plus interest as of May 8, 1991 in the amount of $44,843.64 in accordance with paragraphs 21 through 23 of the Conclusions of Law, plus costs and disbursements to be determined at a later date.

Let judgment be entered accordingly.

Dated: 5/28/91 BY THE COURT:

/s/
Allan R. Markert
Judge of District Court

APPENDIX D

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Central Baptist Theological Seminary,

Plaintiff,

vs.

City of New Brighton, State of Minnesota, Department of Natural Resources; and Joseph N. Alexander, individually and as Commissioner of Department of Natural Resources,

Defendants.

Civ. No. C487489344

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court on July 29,1991. Plaintiff Central Baptist Theological Seminary (the "Seminary") was represented by Gregory A. Fontaine and Erik A. Ahlgren, Dorsey & Whitney, Minneapolis, Minnesota, and Defendant State of Minnesota, Department of Natural Resources ("DNR") was represented by A.W. Clapp III and Donald Kannas, Office of the Attorney General, State of Minnesota, St. Paul, Minnesota.

Based on all of the testimony and exhibits received into the record, the various memoranda and arguments submitted by counsel, and all other proceedings herein, this Court makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Timeliness of Motion.

1. The Seminary is entitled to reimbursement of reasonable costs and expenses, including attorney, appraisal and engineering fees, pursuant to Minnesota Statutes Section 117.045.

2. The Seminary is required to bring its motion for costs and expenses promptly following the entry of judgment.

3. This Court has continuing jurisdiction to award costs and expenses after an appeal of its mandamus order has been commenced.

4. Resolving the Seminary's motion for costs and expenses at this time will promote judicial efficiency by allowing all possible issues to be brought before the Court of Appeals in one hearing.

5. This motion for costs and expenses is a non-dispositive motion and was required to be served upon opposing parties and filed with the Court at least fourteen (14) days prior to the date of the scheduled hearing.

6. The Seminary served and filed its notice of motion and motion for costs and Expenses on July 15, 1991.

7. The Seminary timely served and filed the notice of motion and motion for costs and expenses, and this Court has jurisdiction to hear and decide this matter.

Reasonableness of Attorney's Fees.

8. The Seminary and the law firm which it retained to represent it in this matter, Dorsey & Whitney, entered into a letter agreement dated November 3, 1986 which provided that Dorsey & Whitney would receive a thirty-three and one-third percent (33 1/3%) contingency fee to be deducted from the ultimate recovery obtained in this

matter. All other costs and expenses incurred in bringing this action, including the disbursements incurred by Dorsey & Whitney, were paid by the Seminary regardless of the amount of the ultimate recovery in this matter. The letter agreement did not provide for representation with regard to an appeal of this matter.

9. Subsequently, the Seminary and Dorsey & Whitney entered into an oral agreement whereby Dorsey & Whitney would represent the Seminary in the appeal of this matter for an additional seven and two-thirds percent (7 2/3%) of the ultimate recovery. Again, pursuant to this oral agreement, the Seminary would remain responsible for all other costs and expenses including disbursements incurred by Dorsey & Whitney.

10. DNR filed a notice of appeal relating to this Court's mandamus order on August 2, 1991.

11. Based on DNR's appeal, the Seminary is contractually bound and will actually incur attorney's fees equal to forty percent (40%) of the ultimate recovery in this matter.

12. Contingency arrangements providing for an attorney fee equal to thirty-three and one third percent (33 1/3%) of the ultimate recovery for work conducted through trial and forty percent (40%) of the ultimate recovery if the matter as appealed are commonplace in the legal industry and are reasonable.

13. Attorney fees equal to forty percent (40%) of the Seminary's ultimate recovery in this matter are reasonable and appropriate considering the extensive preparation, legal research and briefing required to adequately present the case in this matter.

14. No adjustment to the amount of attorney's fees is needed to reflect time spent researching and bringing the Seminary's original action in Federal Court or the action against the City of New Brighton because all such time was closely related to and effectively

indistinguishable from the time spent pursuing the action against DNR in this Court.

Reasonableness of Other Costs and Expenses.

15. The Seminary incurred additional costs and expenses, including fees for engineering, consulting and appraisal experts and for miscellaneous expenses, including deposition transcripts, in an amount equal to $68,095.25. The costs and expenses awarded under this paragraph are in addition to the attorney's fees awarded herein.

16. These costs and expenses in the amount of $68,095.25 are reasonable in light of the facts and circumstances of this case.

Interest.

17. The Seminary is entitled to interest on the $68,095.25 awarded pursuant to this motion.

18. Interest on this award will be determined pursuant to Minnesota Statute Section 549.09.

19. Such interest will begin to accrue as of the date of the award and will continue to accrue on all outstanding amounts until the award is paid in full.

ORDER

A. DNR shall pay to the Seminary reasonable attorney's fees in a sum equal to forty percent (40%) of (i) the compensation awarded by the condemnation commission or, if an appeal is taken from the award of the condemnation commission, the compensation awarded by the district court hearing that appeal, and (ii) the relocation expenses ordered by this Court pursuant to the order of this Court dated May 8, 1991.

B. DNR shall pay to the Seminary a sum equal to $68,095.25 for those costs and expenses referred to in ¶ 15 of this Order.

C. DNR shall pay to the Seminary interest on the $68,095.25 awarded pursuant to this order calculated at the statutory rate provided in Minnesota Statutes Section 549.09 from the date of this order until the award is paid in full.

Dated: 8/19/91

/s/
Allan R. Markert
Minnesota District Court Judge

APPENDIX E

STATE OF MINNESOTA
IN SUPREME COURT

C5-91-1401 AND C7-91-1934

Central Baptist Theological Seminary,
Respondent,

vs.

City of New Brighton,
Defendant,

State, Department of Natural Resources, et al.,
Appellants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Central Baptist Theological Seminary for further review be, and the same is, denied.

Dated: August 27, 1992

BY THE COURT:

/s/
Chief Justice

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Minn. Stat. § 105.37, subds. 14 and 15 (1984)

§ 105.37 DEFINITIONS.

* * *

Subd. 14. "Public waters" includes and shall be limited to the following waters of the state:

(a) All water basins assigned a shoreland management classification by the commissioner pursuant to section 105.485, except wetlands less than 80 acres in size which are classified as natural environment lakes;

(b) All waters of the state which have been finally determined to be public waters or navigable waters by a court of competent jurisdiction;

(c) All meandered lakes, except for those which have been legally drained;

(d) All waterbasins previously designated by the commissioner for management for a specific purpose such as trout lakes and game lakes pursuant to applicable laws;

(e) All waterbasins designated as scientific and natural areas pursuant to section 84.033;

(f) All waterbasins located within and totally surrounded by publicly owned lands;

(g) All waterbasins where the state of Minnesota or the federal government holds title to any of the beds or shores, unless the owner declares that the water is not necessary for the purposes of the public ownership;

(h) All waterbasins where there is a publicly owned and controlled access which is intended to provide for public access to the water basin; and

(i) All natural and altered natural watercourses with a total drainage area greater than two square miles, except that trout streams officially designated by the commissioner shall be public waters regardless of the size of their drainage area.

The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or by whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union.

For the purposes of statutes other than sections 105.37, 105.38 and 105.391, the term "public waters" shall include "wetlands" unless the statute expressly states otherwise.

Subd. 15. "Wetlands" includes, and shall be limited to all types 3, 4 and 5 wetlands, as defined in U. S. Fish and Wildlife Service Circular No. 39 (1971 edition), not included within the definition of public waters, which are ten or more acres in size in unincorporated areas of 2-1/2 or more acres in incorporated areas.

* * *

Minn. Stat. § 105.38 (1961)

§ 105.38 DECLARATION OF POLICY.

In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all waters in streams and lakes within the state which are capable of substantial

beneficial public use are public waters subject to the control of the state. The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or on whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union. This section is not intended to affect determination of the ownership of the beds of lakes or streams.

(2) The state, to the extent provided by law from time to time, shall control the appropriation and use of surface and underground waters of the state.

(3) The state shall control and supervise, so far as practicable, the construction, reconstruction, repair, removal, or abandonment of dams, reservoirs, and all control structures in any of the public waters of the state.

Minn. Stat. § 105.38 (1984)

§ 105.38 DECLARATION OF POLICY.

In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all public waters and wetlands are subject to the control of the state.

(2) The state, to the extent provided by law from time to time, shall control the appropriation and use of surface and underground waters of the state.

(3) The state shall control and supervise, so far as practicable, any activity which changes or which will change the course, current, or cross-section of public waters or wetlands, including but not limited to the construction, reconstruction, repair, removal,

abandonment, the making of any other change, or the transfer of ownership of dams, reservoirs, control structures, and waterway obstructions in any of the public waters or wetlands of the state.

Minn. Stat. § 105.42, subd. 1 (1984)

§ 105.42 PERMITS; WORK IN PUBLIC WATERS.

Subdivision 1. It shall be unlawful for the state, any person, partnership, association, private or public corporation, county, municipality or other political subdivision of the state, to construct, reconstruct, remove, abandon, transfer ownership, or make any change in any reservoir, dam or waterway obstruction on any public water; or in any manner, to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, by any means, including but not limited to, filling, excavating, or placing of any materials in or on the beds of public waters, without a written permit from the commissioner previously obtained. Application for such permit shall be in writing to the commissioner on forms prescribed by him. No permit shall be required for work in altered natural watercourses which are part of drainage systems established pursuant to chapters 106 and 112 when the work in the waters is undertaken pursuant to those chapters.

This section does not apply to any public drainage system lawfully established under the provisions of chapter 106 which does not substantially affect any public waters.

The commissioner, subject to the approval of the county board, shall have power to grant permits under such terms and conditions as he shall prescribe, to

establish, construct, maintain and control wharfs, docks, piers, levees, breakwaters, basins, canals and hangars in or adjacent to public waters of the state except within the corporate limits of cities.

* * *

Minn. Stat. § 105.45 (1984)

§ 105.45 PERMITS AND ORDERS OF COMMISSIONER; NOTICE

The commissioner shall make findings of fact upon all issues necessary for determination of the applications considered by him. All orders made by the commissioner shall be based upon findings of fact made on substantial evidence. He may cause investigations to be made, and in such event the facts disclosed thereby shall be put in evidence at the hearing or any adjournment thereof.

If the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, he shall grant the permit, and, if that be in issue, fix the control levels of public waters accordingly. In all other cases the commissioner shall reject the application or he may require such modification of the plan as he deems proper to protect the public interest. In all permit applications the applicant has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.

In granting a permit the commissioner may include therein such terms and reservations with respect to the amount and manner of such use or appropriation or method of construction or operation of controls as

appears reasonably necessary for the safety and welfare of the people of the state.

Notice of all orders made after hearing shall be given by publication of the order once each week for two successive weeks in a legal newspaper in the county where the hearing was held, and by mailing copies of the order to all parties who entered an appearance at such hearing.

The commissioner shall make his order pursuant to hearing within 60 days after the completion of the hearing.

Minnesota Rules 6115.0210, subparts 1–3

6115.0210 STRUCTURES IN PROTECTED WATERS.

* * *

Subpart 1. **Goals.** It is the goal of the department to limit the occupation of protected waters by offshore navigational facilities, retaining walls, and other structures in order to:

A. preserve the natural character of protected waters and their shorelands;

B. provide a balance between the protection and utilization of protected waters; and

C. encourage the removal of existing structures which do not serve the public interest from the beds of protected waters at the earliest practicable date.

Subp. 2. **Scope.** This part applies to the placement, construction, reconstruction, repair, relocation, abandonment, or removal of any structure placed on or in protected waters.

Subp. 3. **Placement of structures not permitted.** Placement of structures shall not be permitted where the structure:

A. Will obstruct navigation or create a water safety hazard.

B. Will be detrimental to significant fish and wildlife habitat, or protected vegetation. Construction is prohibited in posted fish spawning areas.

C. Is designed or intended to be used for human habitation or as a boathouse.

D. Is designed or intended to include walls, a roof, or sewage facilities.

* * *

No. 92-925

Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CENTRAL BAPTIST THEOLOGICAL SEMINARY,

Petitioner,

vs.

STATE OF MINNESOTA, DEPARTMENT OF NATURAL RESOURCES AND JOSEPH N. ALEXANDER, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Minnesota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state court decision in this regulatory taking case is in any way inconsistent with *Lucas v. South Carolina Coastal Council.*

2. Whether the Supreme Court of the United States should review the way in which the state court applied the state's law of collateral estoppel.

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No. 92-925

In The

Supreme Court of the United States

October Term, 1992

CENTRAL BAPTIST THEOLOGICAL SEMINARY,

Petitioner,

vs.

STATE OF MINNESOTA, DEPARTMENT OF NATURAL RESOURCES AND JOSEPH N. ALEXANDER, INDIVIDUALLY AND AS COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Minnesota

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the Minnesota Court of Appeals rejecting their "regulatory taking" claim. The court ruled against Petitioner because in Minnesota the bundle of property rights associated with riparian and lakebed ownership is limited by state common law to activities that are reasonable and consistent with the public welfare. The court applied that state common law requirement to Petitioner's proposal to build a 550 foot tall radio tower in the middle of Jones

Lake, and found it did not pass muster. Contrary to Petitioner's assertion, the court did not deny compensation on police power grounds. Rather, it ruled that state common law independent of and predating the state's police power laws regarding alteration of waterbodies, militated against the construction of the radio tower in the lake.

The petitioner owns most of the bed of Jones Lake, a 28 acre wetland. It bought this underwater property in 1962 for $100 per acre. It erected a radio tower on adjacent upland it owned, anchoring two of the four guywires which held up the tower, in the bed of the lake near its shore. It transferred ownership of the tower and the upland to a radio company. In 1982 the tower blew down, and changes in the local zoning ordinance prevented reconstruction of the tower on the same site. The petitioner then applied to the Minnesota Department of Natural Resources for a permit to construct a radio tower in the middle of Jones Lake. The permit was denied, the denial was upheld by the State Court of Appeals, and a petition for review was denied by the State Supreme Court. Petitioner then initiated an action in state district court asking for an order directing the state to initiate condemnation proceedings against Petitioner's 25 acre lake parcel, on grounds that it had been denied all reasonable use of the property in contravention of the just compensation clauses of the state and federal constitutions. The district court granted the order. On appeal, the State Court of Appeals reversed, on the ground that putting the radio tower in the lake was not a property right under Minnesota common law which requires that the use of a water body be reasonable and consonant with

the public welfare. The State Supreme Court denied review.

REASONS TO DENY THE PETITION

A writ of certiorari should not issue because Petitioner has failed to show that there are "special and important reasons" for this court to grant discretionary review pursuant to Supreme Court rule 10.

Although the state court's decision was issued before this Court decided *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992), it was based on precisely the sort of existing rules of the state's common law of property recognized in *Lucas*, presenting no conflict with any decision of this or any other federal appellate or state court. Petitioner's argument against the state court's application of collateral estoppel raises a question of state law only, presenting no federal question.

I. THE MINNESOTA COURT OF APPEALS DECISION THAT PETITIONER DID NOT HAVE A PROPERTY RIGHT TO BUILD A RADIO TOWER IN JONES LIKE IS ENTIRELY CONSISTENT WITH THE MOST CURRENT TAKINGS JURISPRUDENCE.

The central premise of petitioner's argument is that the state court based its denial of petitioner's inverse condemnation claim on newly-applied statutory restrictions rather than on the owner's right under the previously-existing common law. Contrary to petitioner's

representations, however, the Minnesota Court of Appeals based its decision on the state's common law of property rights. Because petitioner's central premise is wrong, the petition should be denied.

The state court held that Minnesota's common law of property rights in the beds of water bodies limits those rights to uses which are "reasonable [and] consistent with the public welfare." *Central Baptist Theological Seminary v. State of Minnesota Department of Natural Resources,* 487 N.W.2d 528, 533 (Minn. Ct. App. 1992), rev. denied (Minn. Aug. 27, 1992). The court cited as precedent for its decision *Johnson v. Seifert,* 257 Minn. 159, 100 N.W.2d 694 (1960). In that case a landowner was required to remove a fence he had placed on lakebed that he owned, because it was interfering with the rights of others to use the waterbody. The decision had nothing to do with application of the state's police power; rather, it was based entirely on deeply rooted state common law. For example, *Schaefer v. Marthaler,* 34 Minn. 487, 26 N.W. 726 (1886), established that one riparian owner of a wetland bed does not have a property right to use the wetland in a way (in that case draining it) that injures the riparian rights of another bed owner. One hundred years ago, Chief Justice William Mitchell wrote that the public interest in the state's waterbodies reaches beyond questions of navigability and bed ownership:

> To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

Lamprey v. State, 52 Minn. 181, 200 53 N.W. 1139, 1143 (1893). Based on these precedents the state court concluded that the common law existing when petitioner purchased the property restricted its use to those things that are "reasonable [and] consistent with the public welfare." It was this fundamental common law limitation that informed the decision below.

The state court decision is 100 percent consistent with the *Lucas* exception to the categorical requirement for just compensation:

> Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of this title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the "bundle of rights" that they acquire when they obtain title to the property.

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S. Ct. 2886, 2899 (1992). The state court identified precisely such state common law traditions, in place when petitioner bought the lake bed, "limitations which inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 112 S. Ct. at 2900. The bundle of rights that the Seminary acquired when it bought a portion of the bed of Jones Lake never included the right to install a 550 foot radio tower and its associate guy wires in the middle of the lake, because those rights

were always subject to the "reasonable and consistent with the public welfare" restriction of the common law.[1] In concluding that the proposed radio tower is not "reasonable and consistent with the public welfare," the court ruled that the prior adjudication under the state's police power regulatory statue had already made the same determination. In so ruling, the court was not relying only on the newly-enacted law, however. Instead, it merely found that the new law, in this instance, had resulted in a determination of precisely the same issue of reasonableness and consistency with the public welfare that the pre-existing common law required.

Because the state court relied on pre-existing common law, its decision was consistent with the takings jurisprudence of this Court as reflected in the *Lucas* decision. There is, therefore, no reason to grant the petition.

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[1] Clearly the real estate market at large recognized that the property rights associated with owning the bed of a water body were substantially limited, for the petitioner's purchase price of the property in this commercially zoned area in an inner ring suburb in the Minneapolis/St. Paul metropolitan area was a nominal $100 per acre (hardly an investment commensurate with their claimed expectation). The value of the property would be three quarters of a million dollars if a radio tower could be constructed in it because land zoning in the Twin Cites metropolitan area makes it extremely difficult to find a site where such a tower can be built. The record shows that without a radio tower permit, the property's fair market value is $10,000 – four times what the petitioner paid for it.

II. THE COURT LACKS JURISDICTION TO HEAR PETITIONER'S ARGUMENTS REGARDING THE STATE COURT'S APPLICATION OF THE STATE LAW OF COLLATERAL ESTOPPEL

This Court has no jurisdiction pursuant to 28 U.S.C. section 1257 to review a final decision of a state court unless a federal question has been raised in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *McGoldrick v. Compagnie Generale Transtlantique*, 309 U.S. 430, 434 (1940); *cf. Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988). The decision of the Minnesota Court of Appeals on the issue of collateral estoppel rests entirely on state law, an adequate and independent state ground raising no federal question. Petitioner's claim that it was thereby deprived of its right to pursue its constitutional claim, is without merit.

A. The State Court Decision Rests Upon an Adequate State Ground.

The state court held that Petitioner was precluded from arguing that putting a radio tower in Jones Lake was reasonable and consistent with the public interest, because the identical issue had been decided already, in *In the Matter of the Application of Central Baptist Theological Seminary*, 370 N.W. 2d 642, (Minn. Ct. App. 1985), rev. denied (Minn. Sept. 19, 1985). (*See* Appendix A-1). In reaching its conclusion, the court ruled on three issues, all of which involve only state law. First it determined that Petitioner's rights were limited at the time of purchase of the property by the "reasonable and consistent with the public welfare" restriction of the common law.

Second, the court decided that the test applied under the more recent statutory provision is the same as the common law limitation. Third, the court ruled that under state principles of collateral estoppel Petitioners were precluded from relitigating that same issue again in the inverse condemnation proceeding. As is apparent, there is no issue of federal law involved in the analysis. The court relied only on state precedent, which makes the issue insulated from review by the U.S. Supreme Court on certiorari. *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-362 (1984).

B. The State Court's Application of Collateral Estoppel Did Not Deprive Petitioner of Its Opportunity to Pursue Its Constitutional Claim.

Petitioner's reliance on *Albrecht v. State of Florida*, 444 So. 2d. 8 (Fla. 1984), betrays Petitioner's argument. *Albrecht* holds that a decision upholding the state's denial of a permit under its police power is not *res judicata* as to a subsequent action for just compensation. Respondent agrees entirely with that holding. The Minnesota Court of Appeals did not foreclose Petitioner's inverse condemnation action on grounds of *res judicata*. Rather, it allowed the action, and only precluded *re*litigation of an *issue*. This distinction between *res judicata* and collateral estoppel is recognized in *Albrecht*:

> It is also a settled rule that when the second suit is between the same parties, but based upon a separate cause of action from the first, the prior judgment will not serve as an estoppel *except as*

> *to those issues actually litigated and determined in it.*

Albrecht, 444 So. 2d at 12 (emphasis added). The Minnesota court found that the issue of reasonableness and consistency with the public welfare, as those terms are understood in the state's common law of property rights in the beds of water bodies, were identical with the issues of reasonableness and public welfare raised in the prior different cause of action regarding the state's application of its police power. The state court held that the issue was identical and had been fully and fairly litigated in the prior case. It expressly rejected Petitioner's argument that the common law restraints of "reasonable" and "public welfare" had a different meaning than the same terms did in the state's police power statute:

> We decline any implicit invitation by the Seminary to conclude "reasonable" or "public welfare" under Minn. Stat. section 105.45 signifies anything different than what is "reasonable" or in the "public welfare" in general.

Central Baptist Theological Seminary v. State of Minnesota Department of Natural Resources, 487 N.W.2d 528, 533 (Minn. Ct. App. 1992).[2]

Petitioner's repeated assertion that it was denied an opportunity to make its taking claim, mischaracterizes

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[2] Contrary to petitioner's claim, it is apparent from the language used by the state court that it did indeed rule on the issue whether the test under the common law was the same as the test under the statute. That the court refused to agree with petitioner's argument does not mean that the court did not rule on the issue.

and misrepresents what happened. Its claim was heard, and was denied because " . . . where there is no right, there can be no taking." *Central Baptist*, 487 N.W.2d at 533. Because there was no right under Minnesota common law, there was no need to pursue federal takings analysis, such as whether Petitioner had been denied all use of its property, and whether its expectation was investment-backed. The constitutional claim was not precluded, it was heard, and it was denied on historic state common law grounds separate and independent from the state's police power authority. The application of collateral estoppel is not the collapse of two different causes of action into one. It is simply the recognition that an issue in the present cause of action is the same as the issue in a preceding and different cause of action.

The state court's analysis of this issue is purely one of state law. It raises no federal question.[3] The U.S. Supreme Court does not undertake to correct errors of state courts in applying state law. The state court's conclusion that Petitioner had no property right under state common law to build the radio tower in Jones Lake, is an adequate basis for denying the taking claim and is independent of federal law. Therefore there is not jurisdiction to review the decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

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[3] Nor does Petitioner's claim that the state court erred in applying *Johnson v. Seifert* to Jones Lake. Nevertheless, Respondent notes that Petitioner's assertion is wrong. Jones Lake is exactly the same kind and size of waterbody to which *Johnson v. Seifert* applied. *Bartlett v. Stalker Lake Sportsmen's Club*, 283 Minn. 393, 400, 168 N.W.2d 356, 360 (1969).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition be in all respects denied.

Dated December 29, 1992.

Respectfully submitted,

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APPENDIX A

In the Matter of the Application of CENTRAL BAPTIST THEOLOGICAL SEMINARY for a Permit to Construct a 500 Foot Radio Tower in the Center of Jones Lake, City of New Brighton, County of Ramsey.

No. CO-85-230

Court of Appeals of Minnesota

July 2, 1985

Review Denied Sept. 19, 1985

Syllabus by the Court

1. The seminary does not have an existing right to build a radio tower in Jones Lake.

2. The Commissioner's decision to deny a permit for the tower is supported by substantial evidence.

Roger J. Magnuson, Minneapolis, for appellant.

Hubert H. Humphrey, III, State Atty. Gen., Donald A. Kannas, Sp. Asst. Atty. Gen., St. Paul, for respondent.

Heard, considered and decided by POPOVICH, C.J., and PARKER and FOLEY, JJ.

OPINION

FOLEY, Judge.

Central Baptist Theological Seminary seeks review of an order of the Commissioner of the Department of Natural Resources denying its application for a permit to

construct a radio tower in Jones Lake in New Brighton. The seminary contends: (1) it has an existing right to construct a radio tower in Jones Lake; (2) substantial evidence does not support the Commissioner's decision; and (3) its property has been taken for public use without just compensation.

We affirm.

FACTS

The seminary is a non-profit corporation which operates a non-profit radio station under its call letters WCTS-FM. In the early 1960's, it purchased 25 acres generally underlying Jones Lake for the purpose of constructing a radio tower. It later purchased one and three quarters additional acres of dry land at the northwest corner of the lake for associated facilities.

After determining that it would be considerably more expensive to construct a tower in Jones Lake than on dry land, the seminary sought a special use permit from the City of New Brighton to construct the tower on the one and three quarters acre parcel (adjacent parcel). New Brighton issued one special use permit for the tower and associated transmission building and another for two guy wire anchors for the tower in Jones Lake.

The seminary entered an agreement with Contemporary Radio which provided that the seminary would construct a 460 foot FM radio tower and sell both the tower and the adjacent parcel to Contemporary Radio. Contemporary Radio agreed to provide space on the tower for

the seminary's antenna for 99 years without cost to the seminary.

The seminary constructed the tower and conveyed the property. In 1969, Entercom merged with Contemporary Radio and assumed the contract between the seminary and Contemporary Radio.

The tower was used until August 1980 when it blew over onto an apartment complex in a windstorm. Entercom investigated replacing the tower but abandoned the effort because of increased cost and New Brighton's rejection of its building permit application. New Brighton subsequently amended its zoning ordinances to require increased setbacks for guyed structures.

Since the collapse of Entercom's tower WCTS has been broadcasting from a 130 antenna located at the seminary. It reaches a 10.6 mile radius with 45.5 KW power. It has an assigned capacity of 100 KW from the Federal Communications Commission and seeks to use its assigned capacity by building a radio tower in Jones Lake.

The seminary entered into an agreement with Park Broadcasting Company which is similar to the one it had with Contemporary Radio. The seminary has agreed to lease its acreage in Jones Lake to Park, the owner of several radio stations. Park has agreed to construct a tower and let the seminary install an antenna on the tower. The seminary is responsible for acquiring the necessary approval from the F.A.A. and New Brighton. It agreed to assist Park in obtaining approval from DNR.

The proposed tower would be mounted on a base 48 feet in diameter, roughly in the center of Jones Lake. It would be supported by three sets of guy wires running from the tower to six anchors located 224 and 448 feet from the base. A 700 foot power line and associated messenger cable or cables would be strung at a height of 15 feet above the lake surface from the tower to a transmission building.

Jones Lake is a 28 acre type 4 wetland. In a 1952 survey it was found to be four and one-half feet deep. In a 1962 survey it was found to be approximately the same. Its ordinary high water mark was estimated at six and one-half feet with an area at that depth of 33 acres.

In 1968 or 1969, New Brighton chose to lower the Jones Lake outlet so it would not have to replace culverts. In 1981, the lake was approximately two to two and a half feet deep.

In an August 9, 1978, survey the lake was rated as having very good overall waterfowl habitat with adequate nesting cover, excellent brood cover, and several loafing sites. There were approximately 90 adult mallards, 50 egrets, several great blue and black-crowned night herons, blue-winged teal, and coot and an American bittern. It was reported to the surveyor that a pair of Canadian geese nested in the lake that summer and approximately 200 egrets had been observed at one time. The lake and adjacent shoreline provided habitat for other wildlife including muskrats, pheasants and cottontailed rabbits. Virginia rails, yellow throats and yellow-headed blackbirds were observed on the lake on May 4, 1983.

On November 22, 1982, the seminary applied to DNR for a permit to construct a 500 foot radio tower in Jones Lake. The seminary requested a contested case hearing after DNR denied the permit.

An administrative law judge concluded Jones Lake was a "public water" before it was purchased, in part, by the seminary and even if it was not a public water at that time, the seminary had no existing right to build in the lake with a possible exception of two anchor piers which could support guy wires for a tower. He further found Jones Lake is a very valuable water and wildlife resource particularly because of its location in an urban area. He concluded that granting of a permit would violate Minn.Stat. § 105.42, subd. 1; Minn. Stat § 116D.04, subd. 6, and several rules and recommended that the Commissioner of Natural Resources deny the seminary's application for a permit. The Commissioner adopted the findings and conclusions and denied the permit. The seminary appeals from the Commissioner's order.

ISSUES

1. Does the seminary have an existing right under Minn.Stat § 105.38(1) to construct a radio tower in Jones Lake?

2. Was the Commissioner's decision supported by substantial evidence?

3. Has the seminary's property been taken for public use without just compensation?

ANALYSIS

1. The seminary contends it is not subject to DNR regulatory authority because it had a right to build a radio tower in Jones Lake before the lake was classified as a public water.

Minn.Stat. § 105.38(1) (1984) provides:

> Subject to existing rights all public waters and wetlands are subject to the control of the state.

The State and the seminary disagree about when Jones Lake became a "public water." However, they agree that at the time the seminary applied to DNR for a permit to build the tower in Jones Lake, it had been classified as a public water, more specifically a type 4 wetland.[1]

It is unnecessary for us to determine when Jones Lake became "public" in order to determine whether the seminary has an existing right to build a radio tower in Jones Lake. When a water is declared "public" it:

> * * * simply become[s] subject to the protection and control of the state under its regulatory scheme. The state exercises this control by virtue of its police power.

Pratt v. State Department of Natural Resources, 309 N.W.2d 767, 771 (Minn.1981). The seminary never "owned" Jones Lake.

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[1] Wetlands are limited to "types 3, 4, and 5 wetlands as defined in U.S. Fish and Wildlife Service Circular No. 39 (1971 edition), not included within the definition of public waters, which are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas. Minn.Stat. § 105.37, subd. 15 (1984).

> One does not, at common law, have title to water in its natural state * * * . Water in its natural state is not property capable of being owned. Rather, one may have rights to the use and enjoyment of the water, rights exclusive of the general public, through ownership of lakeshore or lakebed. These rights the law calls riparian. One does not own the water; one owns riparian rights to the use and enjoyment of the water.

Id. 309 N.W.2d at 772 (citations omitted). The seminary, by reason of its ownership of lakeshore and lake beds, has riparian rights, It acknowledges that there are other riparian owners of Jones Lake.

Jones Lake is controlled by the State "subject to existing rights." Minn. Stat. § 105.38(1). These existing rights are the seminary's riparian rights. *See Pratt*, 309 N.W.2d 772. Riparian rights are those such as hunting, fishing, boating, sailing, irrigating, and growing and harvesting wild rice. *See Johnson v. Seifert*, 257 Minn. 159, 164, 100 N.W.2d 689, 694 (1960); *Pratt*, 309 N.W.2d at 772. A riparian owner:

> * * * has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners * * *

Johnson, 100 N.W.2d at 697.

When defining riparian rights, the court in *Johnson* did not extend the rights to "every pothole or swamp."

Id. That does not concern us. The Legislature has subsequently chosen to extend its control over wetlands, such as Jones Lake, subject to riparian rights. The *Johnson* court's definition of these rights is now applicable to the waters which are now subject to the protection and control of the State under its regulatory scheme.

Building a radio tower in water is not a riparian right. Further, such an obstruction would interfere with the exercise of riparian rights by other riparian owners. The Commissioner did not err by concluding the seminary had no existing right to build a radio tower.

The seminary contends the supreme court erred in *Pratt* by defining existing rights as riparian rights. It argues that Minn.Stat. § 105.38(1) expressly protects all existing rights without limitation and that it has an existing right to build a tower in Jones Lake which is similar to the right one has when one has a non-conforming use subject to local zoning requirements. A non-conforming use is an actual use. *See County of Pine v. State Department of Natural Resources,* 280 N.W.2d 625 (Minn.1979). The seminary's only use of Jones Lake was for an easement to Contemporary Radio for two anchor piers. The lake was not actually used for a radio tower. Thus, the seminary's non-conforming use argument lacks substance.

2. The seminary contends it is entitled to receive a permit under Chapter 105 and the applicable regulations.

It is unlawful for any private corporation to change the cross-section of any public waters by any means without a written permit from the Commissioner of Natural Resources, Minn.Stat. § 105.42, subd. 1 1984). A permit:

> * * * shall be granted * * * only when it will involve a minimum of encroachment, change, or damage to the environment, particularly the ecology of the waterway.

Minn.Stat. § 105.42, subd. 1a (1984).

> If the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, he shall grant the permit * * * . In all other cases the commissioner shall reject the application or he may require such modification of the plan as he deems proper to protect the public interest. In all permit applications the applicant has the burden of proving the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.

Minn.Stat. § 105.45 (1984). The Commissioner determined the seminary did not prove that the proposal is reasonable, practical or that it would promote public welfare.

More specifically the Commissioner concluded the placement of the tower would be detrimental to significant wildlife habitat, contrary to Minnesota Rule 6115.0210, subp. 3B. This section provides for the placement of structures in public waters and states:

> Placement of structures shall not be permitted where the structure: * * * [w]ill be detrimental to significant fish and wildlife habitat, or protected vegetation.

Minn.Rule 6115.0210, subp. 3B (1984).

The Commissioner also determined the proposal is subject to the provisions of the Minnesota Environmental

Policy Act, chapter 116D. Minn.Stat. § 116D.04, subd. 6 (1984), provides:

> Subd. 6. No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

The Commissioner concluded the seminary did not meet its burden under this section because there are reasonable and prudent alternatives to putting the tower in Jones Lake.

The parties initially disagree about which rules are applicable. The seminary argues the applicable rules are those which were in effect at the time it made its application. The State argues the applicable rules are those which were in effect at the time the Commissioner made his decision. The differences in the pertinent rules would not affect the outcome of this case. Nonetheless we note that Minn.Stat. § 105.44, subd. 9 (1984), provides:

> [e]xcept as otherwise expressly provided by law, every permit issued by the commissioner of natural resources * * * shall be subject to the following * * * (3) All applicable provisions of law existing at the time of the issuance of the permit or thereafter exacted by the legislature * * * .

There are rules currently in effect which are the same as those in effect at the time the Commissioner made his decision.

Our task is to determine whether the Commissioner's order was supported by substantial evidence or was arbitrary and capricious. In doing so we examine the administrative record to determine whether it contains relevant evidence which a reasonable mind might accept as adequate to support the Commissioner's findings and conclusions. *See In Re Plum Grove Lake,* 297 N.W.2d 130, 135 (Minn. 1980). We recognize an agency decision enjoys a presumption of correctness and that we should defer to its expertise. *Id.*

The seminary contends substantial evidence supports a public need for the radio tower and the public need outweighs adverse environmental impacts as required by 6 M.C.A.R. § 1.5023(F)(2)(a). Contrary to the assertion made by the seminary, the Commissioner made no conclusion with regard to this rule. He did not need to do so. It is inapplicable on its face. Further, we note it is no longer part of Minn. Rule 6115.0210 (1984). 6 M.C.A.R. § 1.5023(F)(2)(a) applies only to permits for new publicly sponsored structures and for the relocation of existing structures. The proposed tower is not publicly sponsored and it does not currently exist in Jones Lake.

The seminary next contends substantial evidence does not support the Commissioner's conclusion that the proposed tower will cause significant avaian mortality in violation of Minn. Rule 6115.0210, subp. 3B. This rule does not require a showing of significant avaian mortality but rather provides that a structure shall not be permitted in protected waters where the structure "will be detrimental to significant * * * wildlife habitat * * * ." The commissioner made such a finding. It is supported by substantial evidence.

Jones Lake is a 28 acre type 4 wetland. The evidence indicates that urban wetlands are very important because of their scarcity and Jones Lake is an important wildlife habitat for waterfowl in the Ramsey county area. There are 524.1 acres of type 4 wetland in Ramsey county making Jones Lake's acreage approximately five percent of the total in the county. There are 83.5 acres of type 4 wetlands in New Brighton making the Jones Lake acreage more than 30 percent of the total in New Brighton. There are relatively few wetlands on the western side of Roseville, New Brighton and Lauderdale.

Evidence indicates Jones Lake has a good waterfowl habitat and along with other metro wetlands is "fairly close to carrying capacity for waterfowl." Evidence further indicates that the proposed structure would cause numerous waterfowl to avoid the use of the site because the proposed radio tower and guy wires would extend over most of the marsh. However, there is no area for displacement because adjacent wetland habitat is close to carrying capacity.

Further, there is evidence showing that birds and waterfowl will collide with the tower and guy wires causing mortality. The larger birds will be particularly vulnerable as will be those taking off, landing, and in courtship.

Finally, evidence shows that it will take a period of two to three years for revegetation of the temporary road site needed to build the tower.

We find there is substantial evidence in the record which supports the commissioner's conclusion that the structure will be detrimental to significant wildlife habitat. Under the circumstances the Commissioner is precluded from issuing a permit.

The Commissioner also found the seminary did not meet its burden under Minn.Stat. § 116D.04(b). The seminary argues this statute is not applicable because this case does not involve a state action significantly affecting the quality of the environment or any permit for natural resources management or development. We need not address the issue to decide this case. Minn.Stat. § 116D.04(b) does not give the seminary any rights to a permit. Rather it provides further criteria which must be met when certain *state actions* are taken. Here the Commissioner was precluded from issuing a permit once he determined that the tower would be detrimental to a significant wildlife habitat. Therefore, it is unnecessary to consider additional criteria under Minn.Stat. § 116D.04(b), and we decline to do so.

Wetlands provide a unique natural ecosystem because they are capable of supporting a greater diversity of life than other habitats. *County of Freeborn v. Bryson,*

297 Minn. 218, 220, 210 N.W.2d 290, 293 (1973). The legislature's definition of wetlands includes type 4 wetlands which are two and one-half or more acres in incorporated areas but ten or more acres in unincorporated areas. The legislature has clearly expressed an intent to protect urban wetlands and it is our duty to support that goal. *See County of Freeborn by Tuveson v. Bryson*, 309 Minn. 178, 243 N.W.2d 316 (1976). We have no hesitation in doing so in this case.

3. The seminary contends DNR has taken its property for public use without just compensation. This issue has not been considered in any forum and there is no record for us to review on appeal. We decline to address the issue.

DECISION

The seminary does not have an existing right to build a radio tower in Jones Lake. The Commissioner's decision to deny a permit for the tower is supported by substantial evidence.

Affirmed.